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Chained to the Past: An Overview of Criminal Expungement Law in Minnesota —State v. Schultz

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**CHAINED TO THE PAST: AN OVERVIEW OF CRIMINAL
EXPUNGEMENT LAW IN MINNESOTA—
STATE V. SCHULTZ**

Jon Geffen[†] and Stefanie Letze^{††}

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*Beware how you take away hope from another human being.*¹

I. INTRODUCTION

A publicly available criminal record is devastating to an individual's hope of re-integrating into society, especially with respect to employment and housing. Criminal records are

1. Attributed to Oliver Wendell Holmes, Sr. (1809–1894).

routinely used by employers and landlords to decide who is fit to be hired and who will be a good tenant. In a 2001 survey conducted in five major U.S. cities, two-thirds of employers stated that they would not knowingly hire an ex-offender.² Employers and landlords have unfettered access to criminal records in Minnesota³ and nothing in the law prohibits the use of criminal records in evaluating applicants for housing or employment.⁴ Finally, the use of criminal records in employment and housing decisions disproportionately impacts the poor and minorities.

One solution to these problems is to limit access to criminal records. For offenses adjudicated under Minnesota state law, individuals may be able to seal their criminal history through the process of expungement. Once expunged, the criminal record is no longer available to the public.⁵ In Minnesota, expungement means “to erase all evidence of the event as if it never occurred.”⁶ In practical terms however, the record is merely sealed from the

2. JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY, 31 (June 2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf (last visited Mar. 12, 2005).

3. See MINN. STAT. § 13.82, subd. 2 (2004) (“[D]ata created or collected by law enforcement agencies which documents any actions taken by them to cite, arrest, incarcerate or otherwise substantially deprive an adult individual of liberty shall be public at all times in the originating agency.”); *see also id.* § 13.87, subd. 1(b) (“[D]ata created, collected, or maintained by the bureau of criminal apprehension that identify an individual who was convicted of a crime, the offense of which the individual was convicted, associated court disposition and sentence information, controlling agency, and confinement information are public data for 15 years following the discharge of the sentence imposed for the offense.”).

4. In fact, Minnesota Statutes section 364.01 states that “it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders . . . [and] [t]he opportunity to secure employment . . . is essential to rehabilitation and the resumption of the responsibilities of citizenship.” Minnesota Statutes chapter 364 allows for people with criminal records to be employed by the state, unless the crimes for which the person was convicted directly relate to the employment position sought. *See id.* § 364.03, subd. 1.

5. The word “expunge” literally means to erase, or obliterate. THE MERRIAM-WEBSTER COLLEGIATE DICTIONARY 442 (11th ed. 2003). Criminal records, however, are never destroyed. They are merely sealed from public view. The remedy “is limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority.” MINN. STAT. § 609A.01 (2004). This statute specifically states that expungement does not authorize destruction of records or the return of records to the petitioner. *Id.* However, identification data found in arrest records may be returned to the subject of the record. *Id.* § 299C.11.

6. *State v. M.B.M.*, 518 N.W.2d 880, 882 (Minn. Ct. App. 1994) (quoting *Barlow v. Comm’r of Pub. Safety*, 365 N.W.2d 232, 233 (Minn. 1985)).

public and can be accessed in the future in limited situations.⁷ Expungement orders are sometimes referred to as “orders to seal.”

This article explains Minnesota’s expungement law and analyzes a recent Minnesota Court of Appeals decision that limits the expungement remedy. Specifically, this article begins by examining the effects of a criminal record and the purposes of expungement.⁸ An expungement’s main purpose is to seal an individual’s criminal record from public view, thereby allowing the individual to fully reintegrate into society. This article then provides an overview of current expungement law and its history.⁹ This article also explains different types of criminal records and the different mechanisms used to seal each type of record.¹⁰

The focus of this article is on sealing records of convictions. One of the difficulties in sealing a criminal record is in the number of public and private agencies that have a record of the offense. In the past, a court could order all public agencies holding a record of the offense to seal the record.¹¹ But under recent case law, specifically *State v. Schultz*,¹² the Minnesota Court of Appeals found that, under the separation of powers doctrine, district courts only have the authority to seal *judicial* records.¹³ This finding leaves executive branch records available to the public. One example of an executive record is the Bureau of Criminal Apprehension (BCA) record, which is of particular concern because many landlords and employers use BCA records to conduct background checks on applicants. Limiting the district court’s power to seal to judicial records nullifies the expungement remedy and creates an inconsistency in records not contemplated by the court of appeals. Keeping executive branch records available to the public also ignores legislative intent and the practical realities of the separation of powers doctrine. Lastly, in

7. See MINN. STAT. § 609A.03, subd. 7(b) (declaring that an expunged offense may be opened to evaluate a prospective employee in a criminal justice agency or, with an *ex parte* order for purposes of criminal investigation, prosecution or sentencing). “Upon request by law enforcement, prosecution, or corrections authorities, an agency or jurisdiction subject to an expungement order shall inform the requester of the existence of a sealed record and of the right to obtain access to it” *Id.*

8. See *infra* section II.

9. See *infra* section IV.

10. See *infra* section IV(D).

11. See, e.g., *State v. P.A.D.*, 436 N.W.2d 808, 810 (Minn. Ct. App. 1989) (finding that courts may seal records held by executive branch agencies where “necessary or conducive to fashioning a meaningful remedy”).

12. 676 N.W.2d 337 (Minn. Ct. App. 2004).

13. *Id.*

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response to the *Schultz* decision, this article offers some tools that could help defense attorneys avoid the *Schultz* holding.¹⁴

II. THE PURPOSES OF CRIMINAL EXPUNGEMENTS IN MINNESOTA

A criminal expungement seals a criminal record from the public. An expungement can yield invaluable benefits to the individual, especially for the poor and minorities who are particularly affected by criminal records. The impact that an expungement has on society is also substantial. Ultimately, when sealing a record, the benefits to the individual are weighed against the detriments to society.¹⁵ These benefits and detriments are more closely explained below.

A. *The Benefits of Criminal Expungement on Individuals*

Expungement is defined at law as an “extraordinary form of relief.”¹⁶ It does not apply to every individual suffering the detrimental effects of a criminal history. Especially with respect to sealing records of convictions, the remedy is unique and given only to the most deserving individuals. The possibility of an expungement gives hope to those individuals who are forced to the margins of society because of a criminal record.

A person with a criminal history is often prevented from integrating into society.¹⁷ A criminal record carries with it an assumption that a person who has had contact with the criminal justice system is untrustworthy or will have problems in the future.¹⁸ Employers frequently discriminate against persons based solely on their criminal records.¹⁹ Further, persons with drug convictions are

14. See *infra* section VI(D).

15. See *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981); MINN. STAT. § 609A.03, subd. 5(a), (b).

16. *State v. M.B.M.*, 518 N.W.2d 880, 882 (Minn. Ct. App. 1994); MINN. STAT. § 609A.03, subd. 5(a). Expungement is not considered an extraordinary form of relief for individuals seeking sealing of proceedings resolved in their favor. See *id.* § 609A.03, subd. 5(b).

17. See *North Carolina v. Rice*, 404 U.S. 244, 247 (1971) (“A number of disabilities may attach to a convicted defendant even after he has left prison.”).

18. See T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 294 (1998) (“[C]riminal behavior does not typically emerge de novo; instead, such antisocial behavior often begins early in life and remains remarkably stable throughout the life-course.”).

19. See James R. Todd, “It’s Not My Problem”: *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 728 (2004). Public Housing Authorities receiving federal funds must

at least temporarily disqualified from obtaining federal loans or grants for post-secondary education.²⁰ Certain government aid programs for the poor are also unavailable for individuals with criminal histories.²¹ In an all too common vicious cycle, individuals with criminal histories are denied access to education, housing, and employment, which are keys to reducing recidivism.²² They are also excluded from some government aid programs, making it extremely difficult for individuals with criminal histories to meet their basic needs.

For some individuals with criminal histories, the assumption that they will re-offend is absolutely inaccurate. It is important to note that not all criminal records are records of convictions. Some

include a clause in their lease making any drug or violent criminal activity cause for termination of tenancy. *See* 24 C.F.R. § 966.4(l)(3)(B)(2) (2004). Offenses committed by guests, or persons under the “tenant’s control” are still cause for termination. *See id.* § 966.4(f)(12)(ii). Public Housing Authorities and administrators of Section 8 programs have the authority to obtain criminal histories and use them to screen applicants. *See id.* § 5.903; *see also id.* § 960.203(c)(3) (stating that a PHA may use criminal history to assess suitability for tenancy). Private landlords are not required to screen potential tenants for criminal histories, but given that a landlord may be liable for the criminal acts of his tenants or that the property could be forfeited if used for illegal purposes, private landlords have great incentive to screen potential tenants. Heidi L. Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149–50 (2003).

20. *See* 20 U.S.C. § 1091(r) (2003). “This law has led to the withdrawal from school of thousands of college students who have no alternative means of paying for their education.” Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 62 (2002).

21. In Minnesota, an individual is disqualified from receiving General Assistance (GA), General Assistance Medical Care (GAMC), and Minnesota Supplemental Aid (MSA) for five years after the completion of a court-ordered sentence. *See* MINN. STAT. § 256D.024. Some individuals may be exempt from this ban if they are participating in a drug treatment program, have successfully completed a drug treatment program, or have been assessed not to need drug treatment. *Id.* These individuals are also subject to random urinalyses tests. A positive test results in an additional five year wait for benefits. *Id.*; *see also* 21 U.S.C. § 862a(a)(1), (2) (2004) (prohibiting individuals convicted of a felony under either state or federal law from receiving financial support or food stamps through state programs.).

22. The American Bar Association recognized this problem stating that “a regime of collateral consequences may frustrate the reentry and rehabilitation of [those released from prison or supervision], and encourage recidivism.” AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS R-4 (3d ed. 2003), *available at* <http://www.abanet.org/leadership/2003/journal/101a.pdf> (last visited Mar. 12, 2005).

people are mistakenly arrested and later released without even being charged with a criminal offense. Others are acquitted of the crime or had the proceedings against them dismissed. Even though these individuals were never convicted of a crime, criminal records detail their involvement with law enforcement and those records are available to interested parties. For those convicted of a crime, some are rehabilitated, but are still unable to integrate into society because of a criminal record that no longer reflects their trustworthiness or likelihood to re-offend.

B. Particular Benefits of an Expungement for the Poor and Minorities

For some individuals, the re-integration process after contact with the criminal justice system is especially difficult because of their minority or economic status.

With respect to minority individuals, expungement can be a post-incident corrective measure for racial profiling. African Americans are more likely to be arrested or stopped for crimes in which little evidence exists.²³ In Minnesota, the existence of racial profiling makes the detrimental effects of a criminal record even more critical. According to recent research, the arrest rate in Minneapolis for African American males ages eighteen to thirty is fifteen times the arrest rate of white males the same age.²⁴ Similarly, African Americans account for thirty-seven percent of Minneapolis traffic stops, although they represent only eighteen percent of the population.²⁵ And African Americans are “twenty-one times more likely to be arrested for violent crimes than

23. See, e.g., *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (finding that stark statistical disparities proved at least a *de facto* policy on the part of State Police of targeting African Americans for investigation and arrest on a section of the New Jersey Turnpike); see also E. John Gregory, *Diversity is a Value in American Higher Education, but it is Not a Legal Justification for Affirmative Action*, 52 FLA. L. REV. 929 (2000). “The profiling of criminals generally has a fairly long history Police officers who use racial profiling would no doubt justify their use based on these officers’ extensive experience. Perhaps they would say, ‘We have arrested thousands of drug pushers, so we know what they ‘look’ like, including race.’” *Id.* at 949.

24. Council on Crime and Justice, *African American Males in the Criminal Justice System*, 1, available at <http://www.crimeandjustice.org/Pages/Projects/RDI/African%20American%20Males%20in%20the%20Criminal%20Justice%20System.pdf> (last visited Mar. 17, 2005). This data is accurate for the year 1999. *Id.*

25. *Id.* at 2. Forty-three percent of traffic stops involve white drivers, while two-thirds of the city’s population is white. *Id.*

whites.”²⁶ Racial profiling and the high concentration of police activity in predominantly black neighborhoods may account for some of these disparities.²⁷ Sealing a record allows a victim of racial profiling to obtain meaningful employment and adequate housing despite the arrest, charge, or conviction.²⁸

Barriers to re-integration for minorities are also prevalent in the area of employment. While employers are likely to discriminate against people with criminal records, African Americans are the most likely to encounter this barrier. A recent study found that applicants with criminal records experienced a fifty percent reduction in job offers compared to those without, but African American applicants with criminal records experienced a sixty-four percent reduction in job offers.²⁹ A criminal history, therefore, compounds already existing racial bias.³⁰

Being poor also affects the existence of and consequences flowing from a criminal record. First, the poor are more likely to have a criminal record because of their inability to afford legal representation. Some individuals may not have qualified for a public defender, but were still unable to afford representation through the private bar. Without representation, these individuals might not have known to argue for a dismissal prior to prosecution, or a more advantageous plea agreement. They also may not have considered the consequences of pleading guilty to a crime, which could include losing employment and housing. Furthermore, poor individuals may not have had the resources to file for an expungement. Presumably, more affluent individuals hire attorneys to assist them in navigating expungement laws. Many poor individuals, however, have not obtained an expungement that they are otherwise eligible to receive merely because they do not have the resources to hire an attorney to help them in this

26. *Id.* at 1.

27. “‘Racial profiling’ involves the police developing a physical profile of a criminal (i.e., what a criminal ‘looks like,’ such as dress, location, and importantly, race) and then carefully watching or stopping people who meet that profile.” Gregory, *supra* note 23, at 948–49; *see also* Council on Crime and Justice, *supra* note 24, at 3 (describing that racial profiling may be a factor and that African Americans are pulled over at a higher rate in five Minneapolis neighborhoods).

28. *See generally* State v. C.A., 304 N.W.2d 353 (Minn. 1981).

29. AMY L. SOLOMON ET AL., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 14 (2004), *available at* http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf. (last visited Mar. 11, 2005).

30. *Id.*

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endeavor.

Because a poor individual may be more likely to have a criminal history, they experience more difficulty obtaining employment. Currently, older criminal convictions prevent the poor from obtaining jobs at fast food restaurants, assembly jobs, and other entry-level positions. In the authors' experience, many entry-level employers utilize private agencies to obtain criminal histories as a part of routine background checks conducted on all applicants. Understandably, employers are trying to protect themselves from liability or risk of loss. Unfortunately, employers seem to use the existence of any criminal record as a reason to reject applications, rather than considering the length of time since the offense or the relationship between the type of offense and the duties involved in the job.³¹ The existence of any criminal record can ruin an individual's employability.

Recent changes to the Fair Credit Reporting Act (FCRA) have made employment prospects for Minnesota's poor even worse. Prior to 1998, private agencies that maintain criminal data were allowed to report any arrests or convictions up to seven years after the individual's release from all court requirements.³² This provision did not apply to jobs paying \$75,000 or more per year,³³ but that limitation did not affect entry-level jobs. The poor were therefore excluded from entry-level jobs for a finite period of seven years. In 1998, the FCRA was amended,³⁴ eliminating the seven-year time limit. Now, regardless of annual salary, all criminal convictions are reportable for any time period without restriction.³⁵ Poor individuals with criminal histories are now permanently excluded from entry-level jobs, forcing them to rely on government assistance to meet their basic needs. People who want to work and

31. For example, an employer may find it reasonable not to employ a recent drug offender at a pharmacy. *See, e.g.*, WIS. STAT. § 111.322 (2004) (prohibiting employment discrimination based on criminal conviction records); *id.* § 111.335(c)(1) (creating an exception to this prohibition where the circumstances of an offense "substantially relate to the circumstances of the particular job or licensed activity").

32. 15 U.S.C.A. § 1681c(a)(5) (West 1997).

33. *Id.* § 1681c(b)(3) (raising the exception amount from \$20,000 to \$75,000).

34. Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, § 5 (codified as amended at 15 U.S.C. § 1681c (2004)).

35. 15 U.S.C. § 1681c(a)(5) (2004) (prohibits reporting of "[a]ny other adverse item of information, *other than records of convictions of crimes* which antedates the report by more than seven years.") (emphasis added).

are able to work are still forcibly excluded from the workforce.

Although society excludes individuals with criminal histories from the workforce, recent welfare reform is based upon the idea that recipients should be given benefits for a short time until they can procure employment.³⁶ For example, the Temporary Assistance to Needy Families law (TANF) states that one goal of the program is to “end the dependence of needy parents on government benefits by promoting job preparation [and] work”³⁷ TANF requires all recipients who are able to work to obtain employment, thereby reducing people’s reliance on government subsidies.³⁸ Further, certain ex-offenders are completely excluded from receiving government benefits.³⁹ Without expungement, however, people may be unable to find work and will be forced into continued reliance on government benefits. Individuals with criminal records face dichotomous barriers to their survival—a criminal record preventing them from obtaining employment and government benefit programs that require employment. An expungement can correct this injustice by sealing the record where the individual presents no threat to society. Expungement allows poor individuals with criminal histories to obtain employment and support themselves without government assistance, thereby complying with the policies set forth in welfare programs.

C. *Societal Interests Implicated in Criminal Expungements*

Expungement relieves society of the burden of supporting certain individuals with criminal records. As previously explained, an expungement can allow an individual to obtain employment and eliminate the individual’s reliance on government benefits. Employment of the poor translates to fewer individuals on welfare and a reduced burden on the public.

The public also has reasons to oppose criminal expungements

36. See, e.g., 42 U.S.C. § 601(a)(2) (2004).

37. *Id.* TANF provides block grants to the states to provide welfare assistance to families.

38. See *id.* Minnesota’s TANF program is called the Minnesota Family Investment Program (MFIP). A person may not receive MFIP benefits for more than sixty months during his or her lifetime. MINN. STAT. § 256J.42, subd. 1 (2004).

39. See, e.g., 21 U.S.C. § 862a(1)(A), (2) (2004) (stating that individuals convicted of a felony involving possession, use, or distribution of a controlled substance are ineligible for assistance under any state program funded by TANF and benefits under the food stamp program); see also *supra* note 21.

in some instances. Society has an interest in maintaining criminal histories for purposes of investigating future crimes and protecting the community from integrating dangerous or dishonest people into homes and businesses.⁴⁰ One of the practical reasons for maintaining publicly available criminal records is to predict future conduct.⁴¹ For example, an employer might perform a background check to determine whether the individual is likely to commit a crime on the job, which would expose the employer to liability.⁴² With the danger of a lawsuit and the historical record of judgments against employers, some employers have decided that hiring former offenders is simply not worth the risk.⁴³

The public's interest is served, however, by allowing expungements in certain circumstances. Without the possibility of expungement, individuals with criminal histories are forever doomed to a life of substandard housing and menial employment. The existence of the expungement remedy offers hope. This hope gives individuals an incentive to rehabilitate and promotes the public's safety.

40. DEBORAH K. MCKNIGHT, INFORMATION BRIEF: EXPUNGEMENT OF CRIMINAL RECORDS, REPORT FOR THE MINNESOTA HOUSE OF REPRESENTATIVES, 2, *available at* <http://www.house.leg.state.mn.us/hrd/pubs/expgreccs.pdf> (last visited Mar. 11, 2005).

41. See Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1080 (2004) (discussing that recidivist statutes are an attempt to "use the offender's past criminal record as a predictor of future criminal conduct"); Funk, *supra* note 18 and accompanying text.

42. Doctrines such as negligent hiring make it difficult for an employer to take a chance on an individual with a criminal record. See DEREK HINTON, CRIMINAL RECORDS BOOK: THE COMPLETE GUIDE TO THE LEGAL USE OF CRIMINAL RECORDS 79–83 (Michael L. Sankey & Peter J. Weber, eds., Facts on Demand Press 2002). "[N]egligent hiring is a legal doctrine that imposes a duty upon employers to 'assess the nature of the employment, its degree of risk to third parties and then perform a reasonable background investigation to insure [sic] that the applicant is competent and fit for duty.'" *Id.* at 79. Hinton cites the potential for workplace violence and workplace theft as other reasons for employers to use background checks. *Id.* at 81–82.

43. SOLOMON ET AL., *supra* note 29, at 14. Solomon states that "[r]ecently, employers have lost 72 percent of negligent hiring cases, holding them responsible for the loss, pain, and suffering of victims at an average of \$1.6 million." *Id.* (citation omitted).

III. THE IMPORTANCE OF RECORDS HELD AT THE BUREAU OF CRIMINAL APPREHENSION

Historically, Minnesota's criminal records have been very difficult to find and comprehend. Criminal records were located deep within the hidden confines of antiquated county computers and microfilm. Some criminal records were handwritten into large books.⁴⁴ Searching for criminal records is much easier today. Interested parties can still search the old county systems, but many interested parties search the BCA's database.

The BCA maintains publicly available⁴⁵ criminal records from all Minnesota counties, making an individual's statewide criminal history easily accessible.⁴⁶ Police departments, sheriffs' offices, and district courts provide records of arrests, convictions, and other related criminal proceedings to the BCA.⁴⁷ The BCA in turn provides free access to its public database of criminal convictions via computer terminals in their lobby.⁴⁸ One can also access the BCA database of criminal convictions online for a nominal fee, or purchase this database on CD-Rom for only \$40.⁴⁹

In addition to criminal conviction records, the BCA and other

44. In Ramsey County, for example, criminal records were handwritten until the late 1980's. These books are still available at the Ramsey County Courthouse in St. Paul, Minnesota.

45. Minnesota Statutes section 13.87 (2004) requires that the BCA maintain a free database accessible to the public of criminal conviction records for fifteen years from the date of conviction. MINN. STAT. § 13.02, subd. 12. The BCA will release non-convictions to the public if the person seeking access to the record has a release form signed by the person who is the subject of the record. *See id.*

46. BCA records are easily and cheaply obtained. *See id.* § 13.87, subd. 3(b). For \$40, one may purchase a diskette containing all publicly available criminal histories at the BCA. A person can purchase printouts of criminal histories, or use the public computers at the BCA's facility for free. *See* MINNESOTA DEPARTMENT OF PUBLIC SAFETY, MINNESOTA BUREAU OF CRIMINAL APPREHENSION, at <https://cch.state.mn.us/Common/BCAHome.aspx> (last visited Mar. 11, 2005). BCA records are also now available online for \$5.00. *Id.*

47. *See* MINN. STAT. § 299C.10, subd. 1 (directing sheriffs, peace officers, and community corrections agencies to provide identifying information of persons arrested, appearing in court or convicted to the Bureau of Criminal Apprehension).

48. *See id.* § 13.87, subd. 1(b) ("The bureau of criminal apprehension shall provide to the public at the central office of the bureau the ability to inspect in person, at no charge, through a computer monitor the criminal conviction data classified as public")

49. Online access is available at <https://cch.state.mn.us/Common/BCAHome.aspx>.

agencies⁵⁰ maintain records of arrests, dismissed charges, and acquittals. These records can also be obtained by the public and are routinely used to disqualify applicants. At the BCA, records of arrests, dismissals, and acquittals can be accessed only with the consent of the person named in the record.⁵¹ An increasing number of employers, however, require that prospective employees fill out a release form, giving the employer access to publicly and privately maintained BCA records.

Many private agencies have also entered the criminal-record business. These agencies mine criminal history data from county and state systems throughout the country and make the records available to anyone for a fee. Most of these agencies can be accessed through the internet.⁵² Private data mining agencies are regulated by the FCRA.⁵³ In the past, the FCRA prohibited these companies from reporting criminal offenses or arrests for longer than seven years after completion of sentence.⁵⁴ The FCRA was amended in 1998⁵⁵ and now allows private data mining agencies to report criminal convictions without any time restrictions.⁵⁶ Criminal convictions are now allowed to remain on reports from private agencies forever.⁵⁷ Because criminal records are so easily available, they play a large role in employment and housing applications.⁵⁸

50. Other agencies may include the court, the county sheriff's office, or the city police department.

51. See MINNESOTA DEPARTMENT OF PUBLIC SAFETY, MINNESOTA BUREAU OF CRIMINAL APPREHENSION, at <http://www.dps.state.mn.us/bca/CJIS/documents/CCHInformation.html> (last visited Mar. 12, 2005).

52. See, e.g., <http://www.crimcheck.com> (last visited Mar. 10, 2005); <http://www.omni-background-checks.com> (last visited Mar. 10, 2005); <http://www.backgroundcheckgateway.com> (last visited Mar. 10, 2005).

53. 15 U.S.C. § 1681a(a)-(g) (2004).

54. See 15 U.S.C.A. § 1681c(a)(5) (West 1997) (prohibits reporting of "[r]ecords of arrest, indictment, or conviction of crime which, from the date of disposition, release, or parole, antedate the report by more than seven years").

55. Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347 § 5(2)-(3) (1998) (codified as amended at 15 U.S.C. § 1681c(a)(5) (2004)).

56. See 15 U.S.C. § 1681c(a)(5) (2004) (prohibits reporting of "[a]ny other adverse item of information, *other than records of convictions of crimes*, which antedates the report by more than seven years.") (emphasis added).

57. See *id.*

58. SOLOMON ET AL., *supra* note 29, at 14 ("[surveys of potential employers have reported that] the practice of conducting a criminal background check was far from universal, but is more prevalent now than in the past decade.").

IV. HISTORY OF EXPUNGEMENT LAW IN MINNESOTA

Expungement law in Minnesota has two roots: common law and statutory law. Both vary in their history and application.

A. *Statutory Expungement Law*

In 1996, the legislature enacted chapter 609A of the Minnesota Statutes. The intent of chapter 609A was to create uniform procedures for hearing and granting criminal expungements.⁵⁹ Prior to the creation of chapter 609A, each district court handled expungements differently.⁶⁰ Some districts required that notice be served upon the victim of the crime, while others did not.⁶¹ Some districts examined the petitioner's criminal history outside of the district court's jurisdiction, while others did not.⁶² Ultimately, several legislators wanted to create uniform procedures for petitioners to follow.⁶³ The procedures were intentionally created to be somewhat cumbersome to help protect the presumption that criminal records remain publicly available.⁶⁴

Prior to the creation of chapter 609A, various sections of the Minnesota Statutes addressed expungements, sealing of records, or setting aside convictions. Different statutes provided expungement for youthful offenders,⁶⁵ certain drug offenders,⁶⁶ and juveniles

59. Interview with Don Betzold, Senator, Minnesota State Senate, in Brooklyn Center, Minn. (Sept. 27, 2004). Senator Betzold assisted with authoring Chapter 609A in 1996. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; see also MINN. STAT. § 13.01, subd. 3 (2004).

65. MINN. STAT. §§ 609.166–.168 (1971) (repealed 1996). These statutes provided that a felony or gross misdemeanor conviction could be set aside where: a) the offense was committed before the person was twenty-one years of age; b) the offense was the only felony or gross misdemeanor for which the person had been convicted; c) five years had lapsed since the person had served the sentence or was discharged from probation; and d) the offense was not one for which a sentence of life imprisonment may be imposed. *Id.* The court was required to take into consideration the circumstances and behavior of the person after the time of conviction and determine whether it warranted setting aside the conviction. *Id.* § 609.167. If the motion was granted, the order had the effect of setting aside the conviction such that the person was deemed not to have been previously convicted. *Id.* § 609.168. This statute was repealed in 1996 and its concept was not incorporated into Chapter 609A. See *id.* § 609A.01–.03 (2004).

66. See *Id.* § 152.18 (1971). This statute governs the discharge and dismissal of certain controlled substance offenses and allows defendants to defer

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prosecuted as adults.⁶⁷

B. *Judicially Created Expungement Law*

Minnesota has a long common law history with respect to criminal expungements. In 1977, the Minnesota Supreme Court decided *In re R.L.F.*, which recognized that even without statutory authority, the court has the equitable power to seal a record to redress an infringement on the petitioner's constitutional rights.⁶⁸ The *R.L.F.* court, however, refused to go any further and recognize that the court had the power to expunge a record of a criminal conviction to prevent unfairness to an individual where the unfairness did not rise to the level of a constitutional infringement.⁶⁹

In 1981, the Minnesota Supreme Court sanctioned the use of district courts' inherent authority to expunge criminal conviction records in the absence of constitutional concerns.⁷⁰ The C.A. court found that "inherent judicial power governs that which is essential to the existence, dignity and function of a court because it is a court."⁷¹ The inherent authority of a court is "grounded in judicial self-preservation"⁷² and is the means by which a court protects itself from "unreasonable and intrusive assertions of [legislative or

proceedings and be placed on probation for a set period of time. *Id.* If the individual completes probation with no violations, the court discharges the person and dismisses the case. *Id.* § 152.18, subd. 1 (2004). This was not an adjudication of guilt. *Id.* Prior to 1996, the statute provided that the individual may petition for expungement, and the expungement was to be granted as long as the person was in fact discharged and the proceedings had been dismissed. *Id.* § 152.18, subd. 2 (1994) (repealed 1996). This part of section 152.18 laid the foundation for section 609A.02, subdivision 1.

67. *Id.* § 242.31, subds. 1, 2 (1994) (repealed 1996). This statute provided that where a juvenile was certified to the court as an adult and was convicted, the commissioner of corrections could order that the conviction be set aside after the commissioner finally discharged the person. *Id.* This had the effect of nullifying the conviction and purging the person of the conviction. *Id.*, subd. 1. Where a juvenile satisfactorily completed probation, the defendant may make a motion or the court may make its own motion that the defendant's conviction be set aside. *Id.*, subd. 2. This provision was rolled into Minnesota Statutes section 609A.02, subdivision 2.

68. 256 N.W.2d 803 (Minn. 1977).

69. *Id.* at 808.

70. See *State v. C.A.*, 304 N.W.2d 353 (Minn. 1981).

71. *Id.* at 358 (quoting Clerk of Court's Comp. for Lyon County v. Lyon County Comm'rs, 308 Minn. 172, 176, 241 N.W.2d 781, 784 (1976)).

72. *Lyon County Comm'rs*, 308 Minn. at 176, 241 N.W.2d at 784.

executive] authority.”⁷³ Without inherent authority, the separation of powers doctrine “becomes a myth.”⁷⁴ After the Minnesota Supreme Court determined that the court’s inherent authority may be used to issue an expungement, district courts have used their inherent authority to order expungement in situations where the expungement statutes do not apply. Inherent authority expungement significantly increased the scope of relief to individuals who would otherwise not be eligible for expungement.

C. Pardons Extraordinary: Another Means of Eliminating a Criminal Record’s Effects

Individuals suffering from the detrimental effects of publicly available criminal conviction records may also petition the Board of Pardons for relief.⁷⁵ The Board of Pardons may issue a pardon extraordinary, which allegedly has the effect of setting aside and nullifying the conviction.⁷⁶ Once pardoned, the individual is never required to disclose the conviction except before the court or in the licensing process for a peace officer.⁷⁷ A pardon is different than an expungement in that the pardoned record is never sealed from the public.⁷⁸

A pardon extraordinary is an imperfect remedy. The statute does not provide for sealing of pardoned records.⁷⁹ Consequently, even if granted, a pardon does not limit the public’s access to the record. This oversight leads to practical problems. Under the statute, a pardoned individual is not obligated to disclose the offense.⁸⁰ Landlords and employers, however, still perform background checks that will reveal the pardoned individual’s

73. *Lyon County Comm’rs*, 308 Minn. at 177, 241 N.W.2d at 784.

74. *Id.*

75. MINN. STAT. § 638.02, subd. 2 (2004).

76. *Id.*

77. *Id.*

78. See generally *State v. Haugen*, No. C4-98-1400, 1999 WL 138730, at *1 (Minn. Ct. App. Mar. 16, 1999). The petitioner in this case brought a petition for expungement of records relating to an offense for which he was pardoned. *Id.* Mr. Haugen argued that without a sealing, the pardon remedy was “hollow” and he would “forever be ‘haunted by the record of his conviction.’” *Id.* (emphasis in original).

79. See MINN. STAT. § 638.02 (2004). But see *id.* § 638.02, subd. 3 (1991) (stating that once a pardon is granted, the “court shall order all records pertinent to the conviction sealed”). This portion of the 1991 statute was removed effective August 1, 1992. See 1991 Minn. Sess. Law Serv. ch. 319, § 26 (West).

80. MINN. STAT. § 638.02, subd. 2.

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criminal record. Although the record indicates the applicant received a pardon,⁸¹ a person viewing the record may not take the time to read the entire record or understand the ramifications of a pardon. Therefore, it appears the applicant lied in the application because of the nondisclosure. In a specially concurring Minnesota Court of Appeals opinion, Judge Gordon Shumaker recognized this failure finding that without sealing the record from public scrutiny, a pardon cannot accomplish its declared goals. Judge Shumaker stated,

Despite the pardon and the order setting aside the conviction, without a sealing of the public record two significant consequences of the original crime remain. First, the taint of the conviction continues because any member of the public can readily obtain the pardoned individual's prior criminal record. Second, the pardoned individual is presented with a lamentable dilemma. On the one hand, he can deny his prior conviction as the pardon and the laws entitle him to do, but anyone who checks his record will likely conclude that he lied. Now he is both a criminal and a currently dishonest person. On the other hand, he can admit the conviction and thus forego one of the principal benefits of the pardon, namely, nondisclosure Without a sealing of the record from public access the lofty words of the pardon have little substance and even less practical effect.⁸²

While a pardon may be helpful in theory, it is simply unhelpful in redressing the harms caused by a criminal record. Expungement, therefore, is the only way to remove the taint of a conviction and allow an individual to reintegrate into society.

D. Understanding the Underlying Criminal Record and Specific Expungement Remedies

Pursuing an expungement requires that the advocate or pro se petitioner have an absolute understanding of the underlying criminal record. Arrest records are treated differently from acquittals, which are treated differently from convictions, and so on. For purposes of this paper, we will consider criminal records as

81. Telephone Interview with Ms. Julie LeTourneau, Supervisor, Criminal Justice Information Systems Section, Bureau of Criminal Apprehension (Feb. 23, 2005).

82. *Haugen*, 1999 WL 138730, at *2 (Shumaker, J., concurring specially).

one of three types.⁸³ The first type is an arrest-only record. An arrest-only record is created when law enforcement arrests an individual and the person is later released without being charged with a crime by a prosecutor. No court record exists for such an arrest because no contact was made with the court. The second type of record is an in-favor record. An in-favor record is created when the prosecutor charges the individual with a crime, but the proceedings are resolved in the individual's favor.⁸⁴ The third type of record is a conviction record. A conviction record exists where an individual enters a plea of guilt or a finding of guilt is made.⁸⁵

1. *Expungement of Arrest-Only Records*

Shockingly, arrest-only records are routinely used to deny individuals housing and employment. Some states have chosen to prohibit employers and landlords from using arrest-only records when making housing and employment decisions.⁸⁶ Minnesota has not enacted legislation to enjoin such activities. The BCA classifies arrest records as "private data" which means they are typically not available to the public at the BCA,⁸⁷ although they are publicly available at the original arresting agency.⁸⁸ At the BCA, data classified as private is accessible only by the person named in the arrest record or by an individual with a release form authorizing the individual to obtain the information.⁸⁹ An increasing number

83. The records are separated according to their specific procedures and associated burdens of proof for expungement.

84. The phrase "resolved in favor of the petitioner" is taken from Minnesota Statutes section 609A.02, subdivision 3. The courts have further delineated what this phrase means. See *infra* notes 101–104 and accompanying text.

85. MINN. STAT. § 609.02, subd. 5.

86. See, e.g., WIS. STAT. ANN. § 111.321 (West 2004) (stating that an employer may not discriminate on the basis of an arrest record). This exception will not apply if the person is the subject of a pending criminal charge that substantially relates to the job or activity. *Id.* § 111.335(1)(b). Interestingly, Wisconsin also prohibits employment discrimination on the basis of conviction records, unless the crime for which the individual was convicted substantially relates to the circumstances of the particular job or licensed activity. *Id.* § 111.335(1)(c).

87. See MINN. STAT. § 13.87, subd. 1(b) (making criminal history information gathered by statewide systems private data, except data where an individual was convicted of a crime). Private data is data which is made private by statute or federal law and is accessible to the individual subject of that data. *Id.* § 13.02, subd. 12.

88. See *id.* § 13.82, subd. 2.

89. See *id.* § 13.02, subd. 12; see also BUREAU OF CRIMINAL APPREHENSION, CRIMINAL JUSTICE INFORMATION SYSTEMS, <http://www.bca.state.mn.us/cjis/Documents/CCHInformation.html#What%20is%20considered%20private%20inf>

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of employers and landlords require that prospective employees and tenants sign release forms authorizing access to their private criminal history. Arrest records are also the subject of investigation when an individual applies for a job within an industry for which the Minnesota Legislature mandates that background checks be performed.⁹⁰

Using Minnesota Statutes section 299C.11, one can easily expunge many arrest-only records. This section allows for the return of arrest records without the laborious process of filing an expungement petition with the court.⁹¹ To be eligible for a return of arrest-only records, the individual must have no felony or gross misdemeanor convictions in the ten years prior to the arrest.⁹² The individual must also show that the charges were dismissed prior to a finding of probable cause⁹³ or the prosecutor declined to file charges against the individual.⁹⁴

Requests for relief should be made to the BCA and the arresting agency. Under section 299C.11, the BCA or other agency retaining a record of the arrest must return the record,⁹⁵ but is

ormation (in answering the question “Who can access private records?” the BCA states “any individual that has a notarized Informed Consent Form signed by the adult subject of the record”) (last visited Mar. 12, 2005).

90. For example, Minnesota Statutes section 245C.03, subdivision 1 (2004) mandates that a background check be completed on an applicant seeking a license controlled by the Minnesota Department of Human Services.

91. It should be noted that the arrestee must request the return of arrest records; this is not an automatic process. *See* MINN. STAT. § 299C.11(b) (stating that the bureau shall return its records *upon demand*).

92. The statute requires no felony or gross misdemeanor convictions in Minnesota or any other state. *Id.* Misdemeanor or petty misdemeanor convictions do not disqualify an individual from seeking relief under this statute. *Id.*

93. *Id.* at (b)(1). The meaning of probable cause in the statute “is a determination, based on the full record, of whether sufficient probable cause exists to proceed to trial.” *State v. Bragg*, 577 N.W.2d 516, 520 (Minn. Ct. App. 1998).

94. MINN. STAT. § 299C.11(b)(2). For example, Client A was arrested for assault in January 1999 but was never charged with the offense. Client A was convicted of a misdemeanor in 1995 and a felony in 1988. Client A is eligible for relief under § 299C.11 because she has not been convicted of a gross misdemeanor level offense or higher in the ten years *preceding* her 1999 arrest that she is seeking to have expunged.

95. The statute specifically directs that the following originals and any duplicates be returned to the exonerated arrestee: finger and thumb prints, photographs, distinctive physical mark identification data, information on known aliases and street names, and other identification data. MINN. STAT. § 299C.11(b)(2).

allowed to maintain DNA samples and records.⁹⁶ Although the statute states that records must be returned, many agencies, including the BCA, assert that most information exists only in electronic form. Accordingly, the arrestee receives a letter from the agency indicating that the arrest and corresponding information has been deleted from the individual's criminal history.

2. *Expungement of In-Favor Records*

If an individual does not qualify for a return of arrest records under section 299C.11,⁹⁷ one can petition the court to seal the record under Minnesota Statutes chapter 609A. This chapter, in part, allows for records to be sealed where the proceeding was resolved in the individual's favor.⁹⁸ If a person is never formally charged with a crime, the proceeding is deemed to have been resolved in the individual's favor. Other proceedings resolved in the individual's favor include a finding or verdict of not guilty, a dismissal upon motion of the prosecutor, or any other dismissal prior to an admittance or determination of guilt.⁹⁹

If an individual receives a stay of adjudication, it is not guaranteed that the charge will be deemed a proceeding resolved in the individual's favor.¹⁰⁰ In determining whether a proceeding was resolved in an individual's favor, district courts have focused on whether the individual entered a guilty plea or whether the fact-finder determined guilt beyond a reasonable doubt.¹⁰¹ If any finding of guilt is made, the proceeding was not resolved in the

96. *Id.* § 299C.11(d).

97. If the arrestee has a felony or gross misdemeanor conviction within ten years prior to the arrest, the individual must seek relief through the court. *See id.* § 299C.11(c). Alternatively, if the individual had any contact with the court, a petition must be brought to seal the court record and accompanying law enforcement records.

98. *See id.* § 609A.02 (stating grounds for expungement orders).

99. *State v. Ambaye*, 616 N.W.2d 256, 259 (Minn. 2000) (discussing the language "in favor of" in the Minnesota Statutes).

100. *Cf. State v. Roloff*, 562 N.W.2d 29, 31 (Minn. Ct. App. 1997). Under criminal sentencing guidelines, a stay of adjudication is not a conviction. *Id.*

101. *See State v. Davisson*, 624 N.W.2d 292, 296 (Minn. Ct. App. 2001) (finding that a stay of adjudication is not a proceeding resolved in the petitioner's favor and that if there was no valid finding of guilt—either by plea or verdict—these proceedings are resolved in the petitioner's favor). "Dismissal of a [case] after pleading guilty [is] in the nature of a pardon, not a declaration of innocence" *Id.* (citing *State v. M.B.M.* 518 N.W.2d 880, 883 (Minn. Ct. App. 1994)).

petitioner's favor.¹⁰² For example, a finding of not guilty by reason of insanity is not a proceeding resolved in the petitioner's favor because it first requires a finding that the individual committed the crime.¹⁰³ Ultimately, the touchstone of in-favor records is whether a guilty plea was ever entered or whether the court ever made a finding of guilt.¹⁰⁴

If the proceeding was resolved in the individual's favor, any affected agency that objects to expungement bears the burden of proof.¹⁰⁵ That agency must establish "by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record."¹⁰⁶ The objecting party rarely carries this heavy burden.¹⁰⁷ The statute

102. See *id.* The court further stated that "[i]n determining whether a proceeding [was] resolved in [one's favor], the focus is not on whether there was a guilty plea as opposed to a guilty verdict, but whether there was a valid finding that the defendant committed the charged offense." *Id.* (citing *Ambaye*, 616 N.W.2d at 261).

103. See *Ambaye*, 616 N.W.2d at 260 (stating that the jury must have found that the defendant committed the crime in order to render this verdict, otherwise the verdict would have been a simple not guilty); see also MINN. STAT. § 609A.02, subd. 3.

104. See *City of Maple Grove v. Horner*, 617 N.W.2d 452, 455 (Minn. Ct. App. 2000) (finding that all proceedings were resolved in the petitioners' favor where: 1) the petitioners did not plead guilty, 2) the prosecutor agreed to suspend prosecution provided that the petitioners successfully complete a drug diversion program, and 3) the petitioners indeed completed the program); see also *State v. L.K.*, 359 N.W.2d 305, 307–308 (Minn. Ct. App. 1984) (finding that all proceedings were resolved in the petitioner's favor where the petitioner did not enter a plea or otherwise admit guilt and the charge against him was never prosecuted).

Conversely, a guilty plea that is later withdrawn or vacated may still be considered a conviction in expungement law. In *State v. Long*, No. A03-9, 2003 WL 21793993, at *3 (Minn. Ct. App. Aug. 5, 2003), the petitioner's guilty plea to criminal sexual conduct was vacated, the state re-charged him with disorderly conduct, to which he pled guilty. Long then moved for expungement of the criminal sexual conduct charges, alleging that proceedings related to the criminal sexual conduct charge were resolved in his favor. *Id.* at *2. The court of appeals disagreed, reasoning that because the disorderly conduct guilty plea arose from the same set of facts as the criminal sexual conduct allegation, "all proceedings were not resolved in Long's favor." *Id.* (emphasis added). "The assumption of a defendant's innocence, which would normally be concluded from acquittal or dismissal of charges, does not result when . . . the guilt of a crime is admitted." *City of St. Paul v. Froyland*, 310 Minn. 268, 275, 246 N.W.2d 435, 439 (Minn. 1976). Finally, dismissal of a complaint after pleading guilt is "in the nature of a pardon, not a declaration of innocence" and not a determination in favor of the defendant. *Id.* at 271, 246 N.W.2d at 436.

105. See MINN. STAT. § 609A.03, subd. 5(b).

106. *Id.*

107. See *e.g.*, *State v. Walthers*, No. C5-02-2237, 2003 WL 21961467 (Minn. Ct.

is silent on which records the court may include in an order to seal under the statute, but the apparent settled interpretation is that the order can extend to all government agencies holding a record of the offense, including the BCA, regardless of the branch of government to which the agency belongs.

3. *Statutory Grounds for Expungement of Certain Conviction Records*

The legislature created limited grounds in which a person may petition for expungement of a conviction. First, Minnesota Statutes section 609A.02 permits expungement when a person is convicted of certain drug offenses, but successfully completes probationary requirements and the charge is later dismissed and discharged under Minnesota Statutes section 152.18.¹⁰⁸ Second, section 609A.02 also allows expungement of an offense where a juvenile who was convicted as an adult has completed all court ordered probation or other requirements.¹⁰⁹ For these two situations, an expungement is considered an “extraordinary remedy.”¹¹⁰ According to the statute, an expungement is only granted where the petitioner demonstrates by clear and convincing evidence that the expungement would yield a benefit to the petitioner commensurate with the disadvantages to the public and public

App. Aug. 19, 2003). In this case, the Minnesota Court of Appeals found that the district court abused its discretion in denying a petition for expungement of a record that was resolved in the petitioner’s favor. *Id.* at *3. Despite the lower court’s finding of evidence supporting public access to the record, the court still needed to examine the hardship the record caused the petitioner. *Id.* Cf. *In re Quinn*, 517 N.W.2d 895, 898 (Minn. 1994) (denying expungement of an arrest record because (a) an aggrieved person wanted to see the file because she was contemplating filing civil suit and (b) aggrieved newspapers claimed a protectable interest in the information).

108. See MINN. STAT. § 609A.02, subd. 1 (stating that an individual may petition the court for “sealing of all records relating to the arrest, indictment or information, trial, and dismissal and discharge” where the proceedings were dismissed and discharged under Minnesota Statutes section 152.18, subdivision 1 for possession of controlled substance violations codified at sections 152.024, 152.025, and 152.027. No adjudication of guilt is rendered when a court utilizes Minnesota Statutes section 152.18. *Id.* § 609A.03, subd. 6.

109. See *id.* § 609A.02, subd. 2 (stating ground for expungement exists where petitioner was a juvenile certified to the court as an adult under Minnesota Statutes section 260B.125, committed to the custody of the commissioner of corrections after conviction, and the petitioner has either been finally discharged by the commissioner of corrections, or was sentenced to probation and successfully completed the probation).

110. *Id.* § 609A.03, subd. 5(b).

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safety of sealing the record and the burden on the court and public authorities to issue, enforce, and monitor an expungement order.¹¹¹ There are no published or unpublished appellate cases denying a petitioner relief under these two statutorily articulated grounds.

Identical to in-favor records, a court's order to seal typically includes all agencies that have a record of the incident. These agencies may include the court, the BCA, the County Sheriff's Office, the County Attorney's Office, the City Police Department, the City Attorney's Office, and the Probation Office. Some counties also specify agencies unique to their jurisdiction.¹¹²

Interestingly, the expungement statutes never expressly give the court the authority to order that all of these agencies, some of which are executive branch agencies, seal their records. The statutes merely require that any agency whose records may be affected must be notified of the petition.¹¹³ Apparently, the settled interpretation of this notification requirement is that if the petition is successful, these affected agencies must seal their record. There are no cases in Minnesota challenging a court's authority to order an expungement of criminal records, including those held at the BCA and other executive branch agencies, when the grounds for the expungement are enumerated in chapter 609A.

4. Inherent Authority Grounds for Expungement of Conviction Records

If the person's situation meets none of the above-mentioned criteria of sections 299C.11 or 609A.02, and is not an offense for which the legislature has prohibited expungement,¹¹⁴ the only

111. *Id.* This balancing test mirrors the test applied by the courts in which no statutory grounds exist for expungement. *See State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981) (establishing the courts' inherent authority to expunge criminal records where an "expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring the expungement order").

112. For example, expungement orders in Ramsey County frequently include Ramsey County's Project Remand.

113. MINN. STAT. § 609A.03, subd. 3(a).

114. Minnesota Statutes section 609A.02, subdivision 4 does prohibit expungement of a conviction for an offense in which registration is required under Minnesota Statutes section 243.166 (2004). Such offenses include murder while committing or attempting to commit murder, kidnapping, criminal sexual conduct, indecent exposure and others. *See id.* § 243.166, subd. 1.

remaining remedy is to brave the perplexing world of inherent authority expungements.

a. Proof Scheme for Inherent Authority Expungements

District courts have the inherent authority to seal criminal records in situations not articulated in the expungement statutes. In *State v. C.A.*, the Minnesota Supreme Court opined that district courts have the inherent authority to control their own records and those of their agents, along with the equitable power to prevent unfairness to individuals.¹¹⁵ The ability to seal criminal records exists as a function of these powers.

The Minnesota Supreme Court articulated two circumstances in which a court may seal an individual's criminal record. The first circumstance restates the conclusions the Minnesota Supreme Court reached a few years earlier in *In re R.L.F.*¹¹⁶ This circumstance permits expungement where the petitioner's criminal record infringes on his constitutional rights.¹¹⁷ A criminal record as an infringement on constitutional rights has rarely—and never successfully—been argued before a Minnesota appellate court.¹¹⁸ Thus, case law provides little guidance on how a criminal record could infringe on a constitutional right.

The second and most frequently utilized circumstance articulated by the Minnesota Supreme Court authorizes the court to seal a criminal record where the benefit to the petitioner outweighs the detriment to the public of sealing the record and the burden on the court of issuing, monitoring, and enforcing the order.¹¹⁹ This is referred to as the “balancing test.” Under the

115. See 304 N.W.2d at 358.

116. 256 N.W.2d 803, 808 (Minn. 1977).

117. *C.A.*, 304 N.W.2d at 358.

118. See, e.g., *In re C.L.N. for Expungement of Certain Records*, No. C6-88-1400, 1989 WL 3546, at *1 (Minn. Ct. App. Jan. 24, 1989) (summarily rejecting petitioner's constitutional infringement claims for violations of due process and violation of privacy rights). Cf. *United States v. Benlizar*, 459 F. Supp. 614, 623–24 (D.D.C. 1978) (ordering expungement of a conviction where the government actions were unconstitutional in that the government intentionally destroyed evidence, misled the court, and ignored an order of the circuit court of appeals).

119. *In re C.L.N.*, 1989 WL 3546, at *1; see also *State v. Walthers*, No. C5-02-2237, 2003 WL 21961467, at *3 (Minn. Ct. App. Aug. 19, 2003). The *Walthers* decision considered a case in which the lower court failed to consider the disadvantage to the petitioner of keeping the criminal record open. *Walthers*, 2003 WL 21961467, at *2. Outside of Minnesota, some jurisdictions have found that that the benefit to the petitioner is always outweighed by the detriment to the

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balancing test, the courts require that the individual make a significant showing of rehabilitation, a demonstration of a long period of unsupervised good behavior, and evidence that a criminal record is causing the individual a considerable hardship.¹²⁰ The balancing test is discretionary, and consequently there are no cases that one is guaranteed to win or to lose. The facts of each case are weighed carefully as the judge balances the benefit to the petitioner against the detriment to the public of losing access to the record.¹²¹ Certainly, this is an area where good advocacy skills on either side can make the difference in a difficult case. The individual cannot truly prevail, however, unless all publicly accessible criminal records are sealed.

b. The Scope of the Remedy Available in Inherent Authority Expungements

The extraordinary relief that an expungement provides is valueless unless all publicly available records are sealed. The purpose of an expungement is to be free from the restrictions that a publicly available criminal record imposes. For example, a rehabilitated individual may obtain stable housing and employment if a record is sealed. To do this, the record must be made unavailable to landlords, employers, and the public at large. Limiting the public's access to criminal records is difficult because criminal records can be obtained from many sources. Criminal records are held by government agencies within different branches of government, and by private companies that operate in the business of gathering criminal records.¹²²

In petitions brought under the inherent authority of the court, a battle exists among attorneys, prosecutors, and executive branch

public. *Id.* at *3. For example, the Fifth Circuit ruled in 1972 that “[t]he judicial editing of history is likely to produce a greater harm than that sought to be corrected.” *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972). The Fifth Circuit has since changed its views. *See generally* *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 (5th Cir. 1997).

120. *See C.A.*, 304 N.W.2d at 358.

121. *See id.*

122. *See, e.g.*, *Omni Background Checks*, at <http://www.omni-background-checks.com/> (last visited Mar. 12, 2005); *AAA Background Checks*, at <http://www.infotel.net/> (last visited Mar. 12, 2005). These are just a few of the numerous agencies listed through the internet that provide criminal background checks for a fee. Private companies reporting inaccurate data may be reachable through the Fair Credit Reporting Act. 15 U.S.C. §§ 1681–1681v (2004); *see also supra* notes 55–57 (discussing the Fair Credit Reporting Act).

agencies as to whose records the court can seal.¹²³ Specifically, does the court have the authority to use its inherent authority to issue orders to seal that extend to executive branch agencies?¹²⁴ Arguably, the court's use of its inherent authority to control executive branch agency records is prohibited under the separation of powers doctrine because the court's inherent authority is limited to controlling records held by the court.¹²⁵

i. Brief Overview of the Federal Separation of Powers Doctrine

Under the separation of powers doctrine, each branch of the federal government is separate and distinct¹²⁶ so as to avoid the "tyrannical accumulation of power."¹²⁷ In Federalist Number 47, James Madison examined this theory.¹²⁸ He quoted the Baron de Montesquieu,¹²⁹ stating that "[t]here can be no liberty where the

123. See generally *In re Quinn*, 517 N.W.2d 895 (Minn. 1994); *C.A.*, 304 N.W.2d 353; *State v. Schultz*, 676 N.W.2d 337 (Minn. Ct. App. 2004); *State v. T.M.B.*, 590 N.W.2d 809 (Minn. Ct. App. 1999); *State v. P.A.D.*, 436 N.W.2d 808 (Minn. Ct. App. 1989). Each of these cases discussed sealing executive branch records in the context of the separation of powers doctrine.

124. See *Schultz*, 676 N.W.2d at 341–42 (stating the city's argument that the district court lacked the authority to seal non-judicial records possessed by the executive branch). The *Schultz* court admits that Minnesota case law addressing the issue "does not appear to be entirely consistent." *Id.* at 342.

125. See *id.* at 343 (stating that "the important separation-of-powers issues implicated in expungement questions and the public policy concerns present in those questions compel the decision . . . that . . . the district court in this case overstepped its authority in ordering the executive branch to seal non-judicial records.") The idea that some records are not reachable by the courts is not completely new. For example, courts do not have the authority to seal the Commissioner of Public Safety's records. See *Barlow v. Comm'r of Pub. Safety*, 365 N.W.2d 232, 234–35 (Minn. 1985).

126. Actually, this is never expressed in the Federal Constitution. Rather, the separation of powers is implied in the Constitution's specific grant of powers to each branch of government. See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURVEY OF AM. LAW 329, 337 (2003).

127. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 12 (2003).

128. JAMES MADISON, THE FEDERALIST NO. 47 (Jan. 30, 1788), reprinted in THE FEDERALIST WITH LETTERS OF "BRUTUS" (Terence Ball ed., Cambridge Univ. Press 2003) [hereinafter FEDERALIST 47].

129. The Baron de Montesquieu (1689–1755) was a French political theorist who, among other things, promoted the idea of separation of powers. See Sir Courtenay Ilbert, *Charles Louis de Secondat, Baron de la Brède et de Montesquieu*, in GREAT JURISTS OF THE WORLD 417, 417–18, 437 (Sir John MacDonnell & Edward Manson eds., Assoc. of Am. Law Sch., photo. reprint 1997) (1914). James Madison found Montesquieu's book, *Spirit of Laws*, to be very instructive in understanding

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legislative and executive powers are united in the same person, or body of magistrates”¹³⁰

Madison, however, realizing the complexity of the issue, determined that the separation of powers doctrine is violated only if “the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department”¹³¹ This, Madison said, is where “the fundamental principles of a free constitution are subverted.”¹³²

Further, the “constitutional principles of separated powers are not violated . . . by mere anomaly or innovation.”¹³³ Thus, the federal separation of powers doctrine is malleable enough to allow for such things as administrative procedures, executive oversight of the Senate, and judicial authority to strike down unconstitutional laws.¹³⁴ Strict separation of powers may be completely impossible.¹³⁵ In fact, “unless [the] departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which [the separation of powers doctrine] requires as essential to a free government, can never in

that the separation of powers theory did not mandate absolute separation, but called for enough co-mingling of the branches to provide adequate checks and balances. *See id.* at 437; *see also* FEDERALIST 47, *supra* note 128; Joyce Lee Malcolm, *The Novelty of James Madison’s Constitutionalism*, in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 43, 49 (John Samples ed., 2002).

130. FEDERALIST 47, *supra* note 128, at 235 (quoting *Spirit of the Laws*, Vol. 1, Bk. XI, ch. 6). Montesquieu was criticizing Britain for blending the powers of different government branches. *Id.* at 235–36.

131. *Id.* at 236.

132. *Id.* (internal punctuation omitted).

133. *Mistretta v. United States*, 488 U.S. 361, 385 (1989).

134. *See* FEDERALIST 47, *supra* note 128 (discussing state constitutions mandating separation of powers but allowing for involvement of one branch in the work of another). “The Constitution ‘blend[s]’ as well as ‘separat[es]’ powers in order to create a workable government.” *Clinton v. City of New York*, 524 U.S. 417, 481 (1998) (citing 1 K. Davis, *Administrative Law* § 1.09 (1958) (stating that “[t]he danger is not blended power . . . [it] is unchecked power”). In *Minnesota*, administrative procedures survive despite the separation of powers doctrine. *See, e.g., Breimhorst v. Beckman*, 35 N.W.2d 719, 734 (Minn. 1949) (finding that workers compensation laws that gave adjudicative authority to an administrative agency were not in violation of the separation of powers, in part because the awards were subject to judicial review by certiorari).

135. “The great ordinances of the Constitution do not establish and divide fields of black and white.” *Springer v. Gov’t of Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). “We . . . cannot carry out the distinction between [the branches of government] with mathematical precision and divide the branches into watertight [sic] compartments, were it ever so desirable to do so” *Id.* at 211.

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practice, be duly maintained.”¹³⁶

ii. Separation of Powers Doctrine in Minnesota

The Minnesota Constitution states that: “The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”¹³⁷

This concept is simple in theory, but difficult in application. The three branches of government each perform their own duties and are checked or balanced by the work of another branch. James Madison agreed that “powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments.”¹³⁸ The concentration of all power “in the same hands is precisely the definition of despotic government.”¹³⁹

The Minnesota Constitution’s statement regarding the separation of powers implies that for each branch of government, there is a corresponding identifiable function.¹⁴⁰ “This [implication] encourages an interpreter to employ what is usually referred to as the formalist approach to the separation of powers—that is, identifying whether a particular power is legislative, executive, or judicial and then ensuring that it is exercised only by the appropriate branch.”¹⁴¹ After ratification of its constitution, Minnesota gradually realized that it was necessary to avoid a narrow

136. THE FEDERALIST NO. 48 (James Madison) (Feb. 1, 1788), *reprinted in* THE FEDERALIST WITH LETTERS OF “BRUTUS”, 240 (Terence Ball ed., Cambridge Univ. Press 2003) [hereinafter FEDERALIST 48].

137. MINN. CONST. art. III, § 1.

138. FEDERALIST 48, *supra* note 136, at 240.

139. *Id.* at 243 (quoting Thomas Jefferson, *Notes on the State of Virginia*). Jefferson goes on to note that it does not matter whether the powers are “exercised by a plurality of hands, and not by a single one, [because] 173 despots would surely be as oppressive as one.” *Id.* In his discussion, Jefferson is considering the state of Virginia’s constitution which contained a statement on the separation of powers similar to Minnesota’s current statement. *See id.* at 242–43. Jefferson points out that although the statement is strong, the reality is that Virginia’s assembly had “in many instances decided rights which should have been left to judiciary controversy . . .” *Id.* at 243 (emphasis omitted).

140. *See* Tarr, *supra* note 126, at 338 (discussing Indiana’s separation of powers article which is identical to Minnesota’s text).

141. *Id.*

construction of separation of powers and that it was “impractical to view the provision from the standpoint of a doctrinaire.”¹⁴² In 1905, the Minnesota Supreme Court recognized that it was not always easy to discover the line which marks the distinction between the executive, judicial, and legislative functions.¹⁴³ Therefore, “acts . . . [that] are of an ambiguous character or are in part judicial and in part executive or legislative,” do not violate the separation of powers doctrine.¹⁴⁴ “Thus, the modern view of separation of powers . . . [gives] recognition to the fact that there may be a certain degree of blending or admixture of the three powers of government.”¹⁴⁵

iii. The Effect of Separation of Powers on Inherent Authority Expungements

Inherent authority expungements involve a blending of the three powers of government. In *C.A.*, the Minnesota Supreme Court described the court’s inherent authority to seal criminal records stating that “because this authority of the court extends only to its unique judicial functions, courts must proceed cautiously in exercising that authority in order to respect the equally unique authority of the executive and legislative branches of government over their constitutionally authorized functions.”¹⁴⁶ The *C.A.* decision did not provide a decisive rule with respect to the court’s authority to seal executive branch records such as those held at the BCA.¹⁴⁷

142. *In re Hull*, 163 Minn. 439, 444, 204 N.W. 534, 536 (1925).

143. *State ex rel. Patterson v. Bates*, 96 Minn. 110, 116, 104 N.W. 709, 711 (1905).

144. *St. Paul Cos. v. Hatch*, 449 N.W.2d 130, 135 (Minn. 1989) (citing *Patterson*, 96 Minn. at 118–19, 104 N.W. at 712–13). *Cf. Id.* at 135–36 (stating that the *Patterson* analysis cannot be applied to every situation and that some deference should be given to administrative agencies).

145. 16A AM. JUR. 2D *Constitutional Law* § 251 (2004).

146. *State v. C.A.*, 304 N.W.2d 353, 358–59 (Minn. 1981). The court also wrote that the exercise of the court’s inherent authority must be delineated in such a way as to accommodate where appropriate the public policies of access to governmental records. *Id.* at 359.

147. The court found that petitioners must state with specificity the documents and individuals they wish to be subject to an Order to Seal. *Id.* at 360. The *C.A.* court allowed for the return of identification data under Minnesota Statutes section 299C.11. *Id.* The court also found that an Order to Seal would apply to the sheriff and his agents. *Id.* The petitioner in *C.A.* did not state with specificity his requests referring to the county attorney, the police department, the BCA, the district court clerk, the Minnesota Security Hospital at St. Peter, the state board of

Eight years after the Minnesota Supreme Court's landmark *C.A.* decision, the Minnesota Court of Appeals expanded the decision in *C.A.* to allow expungement orders to include records held at the BCA in certain situations.¹⁴⁸ In *State v. P.A.D.*, the court stated that district courts were empowered to order the expungement of all records held by the BCA which are available to the public.¹⁴⁹ Although the Minnesota Supreme Court in *C.A.* recommended that caution be exercised over expunging executive branch records, the *P.A.D.* court opined that the supreme court did not preclude "ordering that records and materials controlled by the other two branches of government be returned or sealed if doing so is necessary or conducive to fashioning a meaningful remedy."¹⁵⁰

If the executive branch records are not included in an order to seal, the expungement is meaningless. The expungement remedy is intended to allow people to obtain housing and employment that would otherwise be unavailable to them due to a background check.¹⁵¹ If the executive branch is not included in the order to seal, then the record is not sealed and is still available to the public through the BCA or any law enforcement agency. Given that employers and landlords frequently use BCA records when

corrections, and the Minnesota Correctional Facility in Stillwater. *Id.* The court stated that "[s]ome of these officials or institutions would have been within reach of the court's inherent power." *Id.* The court had no doubt that the clerk of district court and the county attorney would have been subject to an Order to Seal, *id.*, and that the court may have had authority under Minnesota Statutes sections 299C.11 and 299C.14 to order persons responsible for reporting "arrest, charge, trial, incarceration or release to the BCA not to disclose that information." *Id.* at 361. Finally, the court found that its inherent authority did not extend to the Minnesota Security Hospital at St. Peter or the Minnesota Correctional Facility at Stillwater. *Id.* Overall, the court's discussion regarding parties subject or not subject to an Order seemed to involve two things: 1) the separation of powers doctrine; and 2) to which records the public might have access. The court discussed that an Order to Seal would apply to individuals who have knowledge of the facts surrounding the offense in question and who are responsible for communicating this information to the BCA. *Id.* Discussion is not made of records which are publicly available in print or on computers that do not require that an actual individual communicate the facts of the offense to a member of the public.

148. *State v. P.A.D.*, 436 N.W.2d 808 (Minn. Ct. App. 1989).

149. *Id.* at 810–11.

150. *Id.* at 810.

151. Margaret C. Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1710 (2003) ("the purpose of judicial expungement . . . [is] to both encourage and reward rehabilitation, by restoring social status . . .").

completing background checks, these records must be sealed to fashion a meaningful remedy.

iv. Recent Narrowing of the Court's Inherent Authority

The decision in *P.A.D.* remained the law for ten years, until the Minnesota Court of Appeals decided *Minnesota v. T.M.B.* in 1999.¹⁵² The *T.M.B.* court concluded that the judicial branch had no power to include executive branch agencies where the expungement was granted using the court's inherent authority.¹⁵³ The court stated that expungement of executive branch records intruded "upon the constitutional functions of the executive branch."¹⁵⁴ The *T.M.B.* court also opined that expungement of a petitioner's criminal records is not "essential to the existence, dignity or function of a court."¹⁵⁵ This assertion is in apparent conflict with the Minnesota Supreme Court opinion in *C.A.*¹⁵⁶

The *T.M.B.* decision was somewhat damaging to people seeking expungement under the court's inherent authority. The opinion seemed in direct opposition to the ten-year old *P.A.D.* opinion, but the *T.M.B.* court explicitly indicated it was not overturning *P.A.D.*¹⁵⁷ *T.M.B.*'s confusing language, combined with a lack of cited authority, left some district courts lost and unconvinced. Only some jurisdictions were following the conclusions reached in *T.M.B.*, while others continued to include executive branch agencies in orders to seal. During this time, the

152. 590 N.W.2d 809 (Minn. Ct. App. 1999).

153. See *id.* at 812–13 (stating that "the intrusion upon the constitutional functions of the executive branch that T.M.B.'s expungement request would necessitate . . . is impermissible under the separation of powers doctrine").

154. *Id.* The court cited no binding authority for this proposition. They did, however, cite an Iowa case stating that the court does not have control over arrest records. See *id.* at 812 (citing *State v. Fish*, 265 N.W.2d 737, 739 (Iowa 1978)).

155. *Id.* at 812 (quoting *Clerk of Court's Comp. v. Lyon County Comm'r*, 308 Minn. 172, 176, 241 N.W.2d 781, 784 (1976)).

156. *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981) (stating that "'inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court.' Part of that function is to control court records and agents of the court in order to reduce or eliminate unfairness to individuals, even though the unfairness is not of such intensity as to give a constitutional dimension." (citation omitted)). The court of appeals does not have the authority to overrule the supreme court and it is unclear why the *T.M.B.* court believed this point was debatable. The Minnesota Supreme Court did not grant review of *T.M.B.*

157. See *T.M.B.*, 590 N.W.2d at 813 (stating "notwithstanding our decision in *State v. P.A.D.* . . .").

BCA would seal any record they were ordered to seal.

In 2004, the Minnesota Court of Appeals heard *State v. Schultz*.¹⁵⁸ The *Schultz* opinion clarified *T.M.B.*'s ambiguities and expressly prohibited courts from extending inherent authority expungement orders to executive branch agencies. The following is an outline of the *Schultz* decision and an analysis of the decision in light of the foregoing explanation of expungement law.

V. THE *SCHULTZ* DECISION

On July 23, 1996, Mr. Steven M. Schultz was arrested for second-degree assault in Crystal, Minnesota.¹⁵⁹ Schultz was eighteen years old at the time of his arrest.¹⁶⁰ On March 4, 1997, Schultz pled guilty to felony second-degree assault.¹⁶¹ The Hennepin County District Court stayed Schultz's prison sentence for three years subject to several conditions, including service of jail time.¹⁶² At the time Schultz entered his plea of guilt he believed that a youthful offender statute, which would have allowed him to petition the court for expungement of his conviction five years after his release from probation, would be available to him in the future.¹⁶³ Unfortunately for Schultz, the youthful offender statute was repealed earlier in 1996.¹⁶⁴ Schultz was discharged from probation on March 6, 2000 at which time his felony was reduced to a misdemeanor.¹⁶⁵

Schultz petitioned for expungement of his offense in 2003.¹⁶⁶ He asserted that his record prevented him from finding gainful employment or adequate housing.¹⁶⁷ The City of Crystal and the

158. 676 N.W.2d 337 (Minn. Ct. App. 2004).

159. *Id.* at 339.

160. *Id.*

161. *Id.* Mr. Schultz pled guilty after his attorney advised him of his rights under MINN. STAT. § 609.166 (1994) (repealed 1996). *Id.* at 339–40. For an explanation of second-degree assault, see Minnesota Statutes section 609.222, subdivision 2 (2004), which provides a sentence up to ten years of imprisonment or payment of a fine not more than \$20,000, or both, and Minnesota Statutes section 609.02, subdivision 2 (2004), which defines a felony as a crime for which a sentence of imprisonment for more than one year may be imposed.

162. *Schultz*, 676 N.W.2d at 340.

163. See MINN. STAT. § 609.166 (1971) (repealed 1996); see also *supra* note 65.

164. Neither Schultz nor his attorney realized that this statute had been repealed. *Schultz*, 676 N.W.2d at 339–40.

165. *Id.*

166. *Id.* at 340.

167. *Id.*

State of Minnesota opposed the expungement on two bases: 1) that Schultz did not qualify for an expungement, and 2) that even if the court found that Schultz's record should be expunged, the court did not have the authority to include executive branch agencies in its expungement order.¹⁶⁸

The district court found in Schultz's favor on both issues.¹⁶⁹ The court found that Schultz had demonstrated clear and convincing evidence that "sealing the record would yield a benefit . . . commensurate with the disadvantage to the public and public safety of: 1) sealing the record; and 2) burdening the court and public authorities to issue, enforce and monitor an Expungement Order."¹⁷⁰ The trial court's order instructed the County Attorney, the Crystal Police Department, the Hennepin County Sheriff, and the Bureau of Criminal Apprehension to seal its records.¹⁷¹ All of these agencies are part of the executive branch.

The City of Crystal¹⁷² appealed to the Minnesota Court of Appeals¹⁷³ and delivered the same arguments as it previously brought before the trial court.¹⁷⁴ The City of Crystal also argued that although it was the only party actually appealing, any favorable ruling should apply to all executive branch agencies, including the ones that did not file an appeal.¹⁷⁵ The court of appeals agreed with the City of Crystal, finding that the non-appealing parties' rights were intertwined with those of the appealing party, and any other finding would "work an injustice."¹⁷⁶

The Minnesota Court of Appeals applied an abuse of

168. *Id.*

169. *See id.*

170. *Id.*

171. *Id.*

172. The *Schultz* court referred to the appealing party as the City of Crystal. Specifically, it was the Crystal Police Department appealing, but the court found that "a police department is a component of city government [and] [a]s such, it [was] entirely appropriate for [the] court to refer to the appellant as City of Crystal." *Id.* at 340 n.1.

173. *Id.* at 340.

174. *See id.* at 341–42.

175. *See id.* at 344.

176. *Id.* at 344–45. The court found that *Ex parte Elliot*, 815 S.W.2d 251 (Tex. 1991), was persuasive. *Schultz*, 676 N.W.2d at 344. In *Elliot*, the court found that the "law governing expunction of criminal records creates a unique situation in which all persons and agencies party to an expunction action share not only interwoven but identical interests." *Elliot*, 815 S.W.2d at 252. The court did not address, and indeed seemed not to recognize, the identical interest of the courts, and the interest of the petitioner and the public in consistency in records of the judicial and executive branches that exist when an expungement is granted. *See id.*

discretion standard of review to determine whether the trial court erred in granting the expungement.¹⁷⁷ It found that the trial court had not abused its discretion and ample evidence supported the district court's decision to seal Schultz's criminal record.¹⁷⁸

The *Schultz* court then reviewed de novo the trial court's inclusion of executive branch agencies in its order to seal.¹⁷⁹ The court of appeals found that the trial court lacked the authority to order sealing of records held by executive branch agencies.¹⁸⁰ The court determined that finding otherwise would violate established separation of powers doctrine because criminal records that are not court records fall outside of the scope of the court's authority.¹⁸¹

As a result of the court of appeals decision, Schultz's record is no longer publicly available through the judicial branch. For example, were one to enter Schultz's name into the computerized criminal records system at the Hennepin County Courthouse, the record of his second-degree assault conviction would not appear. The record is available, however, at all executive branch agencies such as the BCA,¹⁸² the Hennepin County Attorney's office, the Hennepin County Sheriff's Department, and the Crystal Police Department. Depending on where individuals and private agencies mine their data, the record may or may not be available. The *Schultz* court was silent regarding the inconsistency in records that would result from its legal conclusions.

VI. ANALYSIS

Because the BCA is the most frequently used source of criminal records in Minnesota,¹⁸³ if the BCA is not included in an expungement order landlords and employers will continue to have

177. *Schultz*, 676 N.W.2d at 341.

178. *Id.*

179. *See id.* at 341–44.

180. *Id.* at 343–44.

181. *Id.* at 344. Neither party petitioned for review by the Minnesota Supreme Court. Perhaps Mr. Schultz and his attorneys considered petitioning for review, but decided against it because of the nature of Mr. Schultz' underlying crime. Second degree assault is a crime of violence. *See* MINN. STAT. § 624.712, subd. 5 (2004) (defining "crime of violence" and including second degree assault under section 609.222 in the definition). Sometimes bad facts make bad law.

182. *See* Telephone Interview with Julie LeTourneau, Supervisor, Criminal Justice Information Systems Section, Bureau of Criminal Apprehension (Feb. 23, 2005). When the BCA receives an expungement order that applies only to judicial records, the BCA does not seal or in any way modify its record. *Id.*

183. *See supra* Part III.

access to records of the offense. The *Schultz* decision has had a tremendous impact on expungements of criminal conviction records. Some counties discontinued including the BCA or executive branch agencies in their orders to expunge. Consequently, where a court concludes that an individual is no longer a threat to society or at risk of re-offending, the individual is still labeled as a criminal and struggles to find employment and housing. After *Schultz* was decided, some volunteer attorney organizations stopped accepting inherent authority cases, believing it would “waste their volunteers’ valuable time on cases with little likelihood of success.”¹⁸⁴

Although the *Schultz* opinion seems to completely close the door on the efficacy of inherent authority expungements, there are still some tools available to circumvent the opinion. These tools include challenging the *Schultz* opinion directly or finding ways to bring a petitioner’s case outside of *Schultz*’s scope.

A. *The Schultz Decision Nullifies the Expungement Remedy*

Without inclusion of the BCA in the expungement order, it is debatable whether *Schultz* received any remedy at all. In *State v. C.A.*,¹⁸⁵ the Minnesota Supreme Court recognized that the judicial branch has the inherent power to correct unfairness to individuals.¹⁸⁶ An example of such unfairness is continuing to punish a person with a publicly available criminal record where the person has been rehabilitated and the record is no longer representative of their trustworthiness or likelihood of re-offending. The C.A. court found that correcting unfairness may include issuing an order to seal a criminal record under the inherent authority of the court.¹⁸⁷ This remedy is meaningless, however, unless the court is allowed to extend its order to seal to all agencies possessing a publicly available criminal record.

First, it is questionable whether a court even has the power to seal a criminal record if the order cannot extend to the BCA or other publicly available criminal records. In *C.A.* the Minnesota Supreme Court stated, “[a]n order based on inherent authority of

184. E-mail from Martha Delaney, Attorney, Volunteer Lawyers’ Network, to Stefanie Letze (Jan. 14, 2005, 16:46 CST) (on file with author). Ms. Delaney links volunteer attorneys with clients seeking expungement.

185. 304 N.W.2d 353 (Minn. 1981).

186. *Id.* at 358.

187. *See id.*

the courts will not be issued in a pointless attempt to confine the dissemination of facts already widely known and recorded in the public sector.”¹⁸⁸ A BCA conviction record is available in the public sector and is, arguably, widely known because of its accessibility. With BCA records now available online,¹⁸⁹ a person’s criminal record has the potential of being very well known. Applying the *Schultz* holding, every inherent authority expungement is a “pointless attempt” to seal records of the conviction because the BCA would still report the offense.¹⁹⁰

Second, the *Schultz* decision prohibits the court from fashioning a meaningful remedy under its inherent equitable power. The expungement statutes and the common law balancing test require that individuals show that expungement will provide them with specific benefits.¹⁹¹ These benefits may include safe housing, stable employment, foreign travel, the ability to adopt children or provide foster care, eligibility for student loans, and eligibility for public housing.¹⁹² Without these benefits, individuals may be unable to support their families or live otherwise productive lives. Individuals seek expungement for various and often heart-wrenching reasons. In deciding these cases, the court balances these hardships with the public’s interest in maintaining access to the record.¹⁹³

188. *Id.*

189. *See supra* note 46 (providing the BCA’s web address).

190. A person seeking an expungement is asking that his or her record be made unavailable to the public, typically to obtain housing or employment. *See, e.g., State v. Schultz*, 676 N.W.2d 337, 340 (Minn. Ct. App. 2004) (asserting an inability to find employment or housing). If the BCA record cannot be sealed and the record is still publicly available, the court is unable to give the petitioner a remedy. *Id.* at 343–44; *see also supra* note 182 (noting that the BCA does not seal or modify its records when an expungement order only applies to judicial records).

191. *See* MINN. STAT. § 609A.03, subd. 5 (2004) (requiring clear and convincing benefit to the petitioner); *C.A.*, 304 N.W.2d at 358.

192. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L. J. 1501, 1501 (2003); *see also* Immigration and Refugee Protection Act, R.S.C., ch. 27, § 36(1)(b) (2005) (Can.) (rendering a foreign national inadmissible to Canada if he or she has been convicted of an offense where the maximum term of imprisonment is at least ten years). Thus, the Conference of Chief Judges developed a boilerplate expungement packet for pro se petitioners that asks, among other things, *why* the person is seeking expungement. *See* Petitioners Instructions for Expungement (Sealing) of Records, 10, *available at* http://www.ramsey.courts.state.mn.us/Word_docs/criminal/Expungement2003b.doc (last visited Mar. 12, 2005) (asking the petitioner to state a purpose, such as “whether expungement is sought for employment or licensure purposes . . .”).

193. *See State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981) (articulating the

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Without inclusion of executive branch records, individuals will not be able to establish that the expungement will provide them with any articulable benefits or eliminate their hardships. The equitable power of the court allows it to create a remedy that will properly redress an injury.¹⁹⁴ The court, therefore, is allowed to fashion a complete remedy to redress the injury that a perpetually available criminal record inflicts where the public's safety is not at risk. The *Schultz* opinion does not mention this important purpose and effectively nullifies the reasoning in *C.A.*

B. The Schultz Decision Ignores the Complexities of Criminal Records

Not only does the *Schultz* opinion ignore the purposes of expungement, but the *Schultz* court's underlying analysis that a BCA record is strictly the property of the executive branch is faulty. The court cited its 1999 *State v. T.M.B.*¹⁹⁵ decision stating that "criminal records are not court records."¹⁹⁶ The question then becomes: what is a criminal record and to whom does it belong?

Ultimately, a criminal conviction record represents the work of all three branches of government.¹⁹⁷ It follows that sealing a criminal record also requires a compilation of efforts. A compilation of efforts is achieved through the expungement hearing process. All agencies that would be affected by an expungement order are served with the petition and notice of hearing.¹⁹⁸ These agencies have the option to appear before a judge or submit a written argument and have their objections heard.¹⁹⁹ The victim of the crime also has the option to appear at

balancing test).

194. See *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 251 N.W.2d 642, 644 (Minn. 1977) (describing the court's broad discretion in fashioning remedies).

195. 590 N.W.2d 809 (Minn. Ct. App. 1999).

196. *State v. Schultz*, 676 N.W.2d 337, 343 (Minn. Ct. App. 2004) (citing *T.M.B.*, 590 N.W.2d at 812).

197. No criminal conviction record would exist without the work of the legislative, executive, and judicial branches. First, the legislature makes known that a certain series of acts constitutes a crime in Minnesota. See MINN. STAT. § 609.015 (2004). Second, law enforcement determines that a person has committed a crime. See *id.* § 13B.01, subd. 6. If a prosecutor charges the person, the person is brought before the court to offer a guilty plea or proceed to trial. MINN. R. CRIM. P. 8. In most cases, up until the close of a case, the judicial and executive branches are working simultaneously on the case. *Id.*

198. MINN. STAT. § 609A.03, subd. 3 (2004).

199. *Id.* subd. 4. But the right to be heard applies to only the victim. *Id.*

the hearing.²⁰⁰ All agencies have the option to appear before a neutral fact-finder, so it seems fair to apply the ruling to all agencies, including the BCA and other executive branch agencies.

While criminal records may not only be “court records” they are also not exclusively “BCA records,” or “executive branch records.” The records of the BCA and the court are inextricably intertwined. The BCA is only reporting records it has received from other sources.

The records maintained at the BCA include data from the criminal court.²⁰¹ Each district court determines how to transmit information to the BCA. For example, Ramsey County has a computer system that is directly linked with the BCA.²⁰² The BCA has access to the court’s data as soon as an individual comes into contact with Ramsey County’s criminal court system.²⁰³ As Ramsey County makes new entries into the computer system, the BCA immediately receives the information.²⁰⁴ By statute, the BCA must make criminal conviction data publicly available on a free database for fifteen years “following the discharge of the sentence imposed for the offense.”²⁰⁵ To accomplish this, district courts must transmit their records to the BCA.

Using Ramsey County as an example, court records are intractably linked to BCA records such that court records *are* BCA records and vice versa. BCA records regarding criminal court cases are merely carbon copies of the original court record. When a Ramsey County judge seals a criminal record that the court created, the order to seal must extend to the BCA if the judge’s intent is to seal all court-created records. Further, even if the order specifies sealing only judicial records, the BCA’s conviction record arguably is a judicial record because it was created by the judicial branch.

The *Schultz* court summarily found that a court would violate the separation of powers doctrine if it used its inherent authority to seal records held at executive branch agencies, but the court did

200. *Id.*

201. *Id.* § 13.87, subd. 1(a).

202. Telephone Interview with Michael Upton, Court Administrator, Ramsey County District Court (Feb. 2, 2004).

203. *Id.*

204. *Id.* This computer system began operation in 1999. *Id.* Prior to 1999, Ramsey County mailed its information to the BCA for felony, gross misdemeanor and certain misdemeanor charges. *Id.*

205. MINN. STAT. § 13.87, subd. 1(b) (2004).

not explore the intricacies of the separation of powers doctrine.²⁰⁶ Rather, the court glibly ruled that the trial court violated the separation of powers doctrine. As Judge Cudahy stated in his dissenting opinion in *United States v. Janik*, “[a]gency files essentially record events transpiring in the courts, with respect to which courts have a continuing interest. Practical considerations . . . should be of sufficient weight to override any theoretical separation of powers objections.”²⁰⁷ In 1995, the Vermont Supreme Court recognized the complexity of the separation of powers doctrine stating that “[w]hen actions of the judiciary overlap with the inherent powers of another branch . . . [t]he mere fact that the judiciary is engaged in action normally characterized as legislative or executive is not important as long as the action is related to a judicial function.”²⁰⁸ Under C.A., the sealing of a criminal record is a judicial function.²⁰⁹ If the court is not allowed to seal criminal records, it is not allowed to perform its unique judicial functions.

C. The Legislature Has Demonstrated its Intent to Include Executive Branch Agencies in All Orders to Expunge

In addition to the court’s inherent powers, the legislature arguably has instructed that executive branch agencies comply with orders to expunge issued under the inherent authority of the court.

1. The Legislature’s Intent as Demonstrated in Minnesota Statutes Chapter 609A

Minnesota’s expungement statutes do not expressly state that the legislature endorses inherent authority expungements. Chapter 609A of the Minnesota Statutes states that it is providing “the grounds and procedures for expungement of criminal records under section 13.82;²¹⁰ 152.18, subdivision 1;²¹¹ 299C.11,²¹² where a

206. *State v. Schultz*, 676 N.W.2d 337, 343 (Minn. Ct. App. 2004) (observing that the court will not expunge a party’s records in the absence of constitutional concerns).

207. *United States v. Janik*, 10 F.3d 470, 473 (7th Cir. 1993) (Cudahy, J., concurring in part and dissenting in part). Judge Cudahy concurred regarding the facts of the case in that they did not present “a strong case in justice and equity for expungement. *Id.* at 474.

208. *In re D.L.*, 669 A.2d 1172, 1177 (Vt. 1995).

209. *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981).

210. Detailing types of law enforcement data and classifying certain data as public or private. *See* MINN. STAT. § 13.82 (2004).

petition is authorized under § 609A.02, subdivision 3;²¹³ or *other applicable law*.²¹⁴ The legislature does not define “other applicable law,” however, one could argue that inherent authority law is an applicable law. The legislature passed Chapter 609A in 1996, well after *C.A.*²¹⁵ was decided in 1981 and *P.A.D.*²¹⁶ was decided in 1989. The legislature was aware of inherent authority expungement law and wanted the procedures in chapter 609A to apply to all expungements.²¹⁷ Additionally, the drafters of chapter 609A agreed that under the separation of powers doctrine, the legislature simply could not eliminate inherent authority expungements even if it wished to do so.²¹⁸

Statutory interpretation also suggests that chapter 609A of the Minnesota Statutes is not intended to limit the inherent authority of the court. The legislature specifically limited expungement of certain convictions. In subdivision four of Minnesota Statutes section 609A.02, the legislature prohibits expungement of convictions that require registration.²¹⁹ If chapter 609A limits expungement only to the grounds enumerated in the statute, this provision prohibiting expungement of certain itemized convictions is rendered meaningless. “A statute should be interpreted, whenever possible, to give effect to all of its provisions, and ‘no word, phrase, or sentence should be deemed superfluous, void, or insignificant.’”²²⁰ The provision prohibiting expungement of offenses that require registration is rendered superfluous if courts

211. Detailing deferred prosecution for first time drug offenders. These offenders receive a stay of adjudication and must complete probation. *Id.* § 152.18, subd. 1. After successfully completing probation, the offense is dismissed. *Id.* The BCA maintains a non-public record of the offense. *Id.* The court’s records of the offense, however, still remain accessible to the public. *Id.* This statute previously allowed for expungement of an offense adjudicated under section 152.18, subdivision 1 because expungement extended to “all official records, other than the nonpublic record retained by the department of public safety”. MINN. STAT. § 152.81, subd. 2 (1994).

212. *See supra* note 97.

213. *See supra* Part IV.D.2.

214. MINN. STAT. § 609A.01 (2004) (emphasis added).

215. 304 N.W.2d 353 (Minn. 1981).

216. 436 N.W.2d 809, 811 (Minn. 1989) (finding that district courts may include the BCA and executive branch agencies in their expungement orders).

217. Interview with Don Betzold, Senator, Minnesota State Senate, in Brooklyn Center, Minn. (Sept. 27, 2004).

218. *See id.*

219. MINN. STAT. § 609A.02, subd. 4.

220. *State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003) (quoting *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000)).

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are not allowed to expunge convictions outside of the narrow provisions set forth in Minnesota Statutes section 609A.02.²²¹ The only way to give effect to the prohibition on expunging such convictions is to interpret chapter 609A as acknowledging expungement of convictions not enumerated in chapter 609A.

Similarly, the legislature requires that any petition for expungement be served upon all agencies with records of the incident.²²² Each of these agencies has the option to oppose the expungement and may present its view to the court as to why its records should not be sealed.²²³ Under *Schultz*, however, this process is pointless. If these agencies' records cannot even potentially be affected by an expungement order, how do they even have standing in the proceeding?

2. *Inconsistent Records, Inconsistent Results*

In addition to the statutory language, there is also value in maintaining consistent records among courts and other agencies. Inconsistency in records among different agencies creates an inferior remedy sometimes referred to as partial expungement. Partial expungement of records means that the record is available at one agency, but not another.²²⁴ This harms the individual seeking expungement, as well as the agencies. The *Schultz* court recognized the harm of partial expungement when it ruled that parties that did not appeal to the court of appeals, such as the BCA, were still entitled to a ruling in their favor.²²⁵ Generally, the rights of non-appealing parties must be affected directly by the appellate court decision in order to be included in the ruling.²²⁶ The *Schultz* court found that although the City of Crystal was the only party to appeal the district court's ruling, the interests of all executive branch agencies were intertwined with the City of Crystal's

221. See *supra* notes 108 and 109 and accompanying text.

222. MINN. STAT. § 609A.03, subd. 3(a) (stating that a petition for expungement must be served on all parties that would be affected by the proposed expungement order).

223. See *id.* Petitioners are required to give notice to any agency that is affected by the proposed order. It follows that these parties may assert an argument before the court explaining why they should not be included in the order.

224. See *State v. Schultz*, 676 N.W.2d 337, 344 (Minn. Ct. App. 2004).

225. *Id.* at 344–45.

226. *Id.* at 344.

interests.²²⁷ The court stated that “a limited reversal would not provide full and effective relief for the appealing party, for it would be ‘unable to cross-reference its criminal records with those of other agencies.’”²²⁸ The *Schultz* court emphasized the importance of uniform management of documentation and opined that reversal of the district court’s order “solely as it pertains to the city . . . would ‘work an injustice’ because it would be upholding the expungement of some non-court records held by the executive branch.”²²⁹

Likewise, allowing expungement of only some publicly available criminal records works an injustice and creates an inconsistency in criminal records. Specifically, partial expungement undermines the goal of uniform management of documentation while failing to preserve the rights of the party seeking expungement.²³⁰ In most cases, the party seeking expungement is asking that his or her record be sealed to obtain housing or employment. If the record is still accessible, there is no remedy. Further, the inconsistency in records could make the petitioner appear suspicious or confuse a prospective employer. Finally, if the petitioner does not disclose his criminal record to the employer and the employer is still able to access it through an executive branch agency, the petitioner appears to be a liar. These injustices can only be corrected by sealing all available records, not just those held with the judicial branch.

3. *The Minnesota Government Data Practices Act*

Minnesota’s legislature intended that executive branch agencies be included in orders to seal within the Minnesota Government Data Practices Act (“Data Practices Act”).²³¹ The Data Practices Act regulates “creation, storage, maintenance, dissemination, and access to government data.”²³² Arguably, the Data Practices Act is violated if a record that has been expunged is still available at any agency.

Under the Data Practices Act, an agency that maintains

227. *Id.*

228. *Id.* (quoting *Ex parte Elliot*, 815 S.W.2d 251, 252 (Tex. 1991)).

229. *Id.* at 345 (internal citations omitted).

230. *Elliot*, 815 S.W.2d at 252.

231. The Minnesota Government Data Practices Act is contained in Minnesota Statutes chapter 13. MINN. STAT. § 13.01, subd. 2 (2004).

232. *Id.* subd. 3.

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records must ensure that these records are accurate.²³³ Accurate means that “the data in question is reasonably correct and free from error.”²³⁴ Records must also be complete.²³⁵ Completeness requires that the data “reasonably reflect[] the history of an individual’s transactions with the particular entity.”²³⁶ Further, “omissions in an individual’s history that place the individual in a false light shall not be permitted.”²³⁷

If a criminal record has been sealed but is still available at a controllable agency, the record is inaccurate. The purpose of an expungement is to “erase all evidence of the event as if it never occurred.”²³⁸ When an expunged record is still available, this purpose is defeated. The sheer availability of an expunged record is an inaccuracy. The data is also incomplete. If expunged data is still available, this is an omission that does not reflect the individual’s most recent contact with the court that resulted in an expungement order.

D. The Schultz Aftermath: Tools for Defense Attorneys

Defense attorneys should be aware that not all jurisdictions are adhering to the *Schultz* holding. The author is personally aware of cases in several counties where orders to expunge, issued under the inherent authority of the court, included executive branch agencies such as the BCA after *Schultz* was decided. The executive branch agencies have complied with these orders.

These district courts have ruled that in spite of *Schultz*, the court still has the equitable power to extend orders to expunge to executive branch agencies. Moreover, the *Schultz* ruling is not definitive because the Minnesota Supreme Court has not ruled on the issue and the Minnesota Court of Appeals has issued contradictory opinions.²³⁹ Because the Minnesota Supreme Court has not ruled on the issue, prosecutors and defense attorneys are continuously watching for the perfect case to litigate at the

233. *Id.* § 13.05, subd. 5.

234. MINN. R. 1205.1500, subp. 2(A) (2004).

235. MINN. STAT. § 13.05, subd. 5.

236. MINN. R. 1205.1500, subp. 2(B) (2004).

237. *Id.*

238. *State v. M.B.M.*, 518 N.W.2d 880, 882 (Minn. Ct. App. 1994) (citations omitted).

239. *See State v. Schultz*, 676 N.W.2d 337 (Minn. Ct. App. 2004); *State v. T.M.B.*, 590 N.W.2d 809 (Minn. Ct. App. 1999); *State v. P.A.D.*, 436 N.W.2d 808 (Minn. Ct. App. 1989).

appellate level. At some point, the Minnesota Supreme Court will likely rule on the issue²⁴⁰ or the legislature will act.²⁴¹ This, however, does not help defense attorneys with the expungement cases that are part of their current caseloads. Arguing that one's case is outside of *Schultz*'s scope is a way to avoid the negative impact of *Schultz*.

The *Schultz* opinion expressly states that it only applies to inherent authority expungements in which the criminal record at issue is not infringing on the petitioner's constitutional rights.²⁴² A more complete remedy is available for individuals that are experiencing constitutional violations.²⁴³ No published or unpublished opinions exist in Minnesota successfully litigating a constitutional violation created by a criminal record. Still, the arguments can and should be made by defense attorneys to demonstrate the importance of the client's case. "A court of equity has jurisdiction over issues involving the maintenance of civil rights . . . and at least in some matters involving consideration of personal rights, e.g., rights protected by the federal or state constitutions."²⁴⁴ "Where constitutional questions are involved, the litigant has the right to raise them in a court of equity, and such court has the right to consider them."²⁴⁵ We have chosen to articulate two constitutional arguments based on protections against cruel or unusual punishment, and procedural due process protections. Other constitutional arguments may well exist.²⁴⁶

240. Neither party in *Schultz* petitioned for review by the Minnesota Supreme Court. Perhaps Mr. Schultz and his attorneys considered petitioning for review, but decided against it because of the nature of Mr. Schultz' underlying crime. Second degree assault is a crime of violence. See MINN. STAT. § 62A.712, subd. 5 (defining "crime of violence" and including second degree assault in the definition). Sometimes bad facts make bad law.

241. See S.F. 545, 84th Leg., Reg. Sess. (Minn. 2005). If passed, this bill would legislate that courts have the authority to extend orders to seal to executive branch agencies.

242. *Schultz*, 676 N.W.2d at 341 ("This court . . . need only address the propriety and scope of a district court's exercise of its inherent power to grant expungement. Further, because *Schultz* does not allege that his constitutional rights are involved in this matter, we limit our discussion to the inherent power of the court to grant expungement in the absence of constitutional concerns.")

243. See *id*; *In re R.L.F.*, 256 N.W.2d 803, 808 (Minn. 1977) (declaring the court's ability to seal criminal records that infringe on the petitioner's constitutional rights).

244. *In re R.L.F.*, 256 N.W.2d at 807 (internal quotation and citation omitted).

245. *Id.* (internal quotation and citation omitted).

246. An argument may exist under the double jeopardy clause of Minnesota's constitution. See MINN. CONST. art. I, § 7. Arguably, expungement is intended to

1. *Criminal Records as Cruel or Unusual Punishment*

For some individuals, granting expungement of their offense while allowing the executive branch to maintain a public record of the offense is cruel and unusual punishment. Minnesota's Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel *or* unusual punishments inflicted."²⁴⁷ The Minnesota Constitution differs significantly from the United States Constitution, which states that "no[] cruel *and* unusual punishments" may be inflicted.²⁴⁸ The United States Supreme Court has sustained punishments that while cruel are not unusual.²⁴⁹

Minnesota's constitution, however, provides more protection than the U.S. Constitution.²⁵⁰ Minnesota's constitution proscribes punishment that is either cruel *or* unusual.²⁵¹ A criminal record, therefore, while not unusual, may be cruel in some situations. Under state law, cruel punishment can relate to a "sentence of such duration that it is out of all proportion to the nature of the crime."²⁵²

Arguably, a publicly available criminal record is part of the court's punishment of a crime. Opponents will argue that the existence of a criminal record is merely a "collateral consequence" of a guilty plea and thus is not afforded constitutional protection.²⁵³ Direct consequences to a guilty plea are those related to the punishment and are defined as flowing definitely, immediately, and

discontinue punishment. Allowing continued availability of an expunged record reinstitutes the punishment and duplicates the punishment that existed prior to expungement. The individual has an expectation of finality of the punishment when expungement is granted, which is one way that double jeopardy concerns can arise. *See State v. Garcia*, 582 N.W.2d 879, 881 (Minn. 1998).

247. MINN. CONST. art. I, § 5 (emphasis added).

248. U.S. CONST. amend. VIII (emphasis added).

249. *See State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998) (citing Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (plurality opinion)).

250. *See State v. McBride*, 666 N.W.2d 351, 361 (Minn. 2003).

251. MINN. CONST. art. I, § 5.

252. *State v. Dinneen*, 289 Minn. 250, 259, 184 N.W.2d 16, 22 (1971).

253. *See, e.g., State v. Byron*, 683 N.W.2d 317, 322–23 (Minn. Ct. App. 2004) "Consequences flowing from the plea that are not punishment serve a substantially different purpose than those that serve to punish, as they are civil and regulatory in nature and are imposed in the interest of public safety . . . [They] serve to protect the public from a potentially dangerous class of persons and are collateral, not direct, consequences of the sentences imposed." *Id.* (citing *Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. 2002)).

automatically from the guilty plea.²⁵⁴ The existence of a publicly available criminal record flows immediately from a guilty plea. Because it is immediate and automatic, the existence of a publicly available criminal record is part of the punishment given by the court.

In *State v. Krotzer*,²⁵⁵ the Minnesota Supreme Court recognized that existence of a criminal record is part of an offender's punishment. Citing *C.A.*,²⁵⁶ the *Krotzer* court affirmed the district court's inherent authority to find that justice would not be served by giving the defendant a criminal record as a predatory sex offender.²⁵⁷ The *Krotzer* court recognized that the district court may, within its discretion, decide not to extend the defendant's punishment to inclusion of a criminal record.²⁵⁸

When an individual pleads guilty to a crime, a record of his or her offense subsequently attaches to his or her name. This was part of the court's punishment. Further, the petitioner has likely lost employment or housing due to this record. Ultimately, the petitioner is treated like a criminal by the community, even though he or she has been completely rehabilitated and sufficiently deterred from all criminal activity. Infinite continuation of punishment after complete rehabilitation is cruel and out of all proportion to many offenses. Put more pointedly, it is simply unfair to continue punishing someone indefinitely and expel them to the margins of our society when they have been rehabilitated and are not a threat to public safety.

2. *Records of Petty Misdemeanors as Violations of Procedural Due Process Rights*

In addition to constituting cruel or unusual punishment, records of petty misdemeanors may violate procedural due process rights. In Minnesota, petty misdemeanors are not crimes.²⁵⁹ Accordingly, the BCA typically does not maintain records of petty misdemeanors. It is still important, however, to request that the BCA be included in any order to seal a petty misdemeanor record because the BCA may have some information about the offense if

254. *Kaiser*, 641 N.W.2d at 904.

255. 548 N.W.2d 252, 254 (Minn. 1996).

256. 304 N.W.2d 353, 358 (Minn. 1981).

257. *See Krotzer*, 548 N.W.2d at 254-55.

258. *See id.*

259. *See* MINN. STAT. § 609.02, subd. 4(a) (2004); MINN. R. CRIM. P. 23.06.

the individual was originally charged with a misdemeanor-level offense or higher.²⁶⁰ Other executive branch agencies, such as the police department involved, may also have a record of the offense and should be included in an order to seal.

Both the Minnesota and United States Constitutions afford criminal defendants several rights. For example, most criminal defendants have the right to counsel and the right to a jury trial.²⁶¹ Conviction without allowing a criminal defendant to take advantage of these rights constitutes a violation of procedural due process rights.²⁶² “In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures.”²⁶³

Defendants charged with petty misdemeanors are not afforded the same rights as criminal defendants because petty misdemeanors are not considered crimes.²⁶⁴ There is no clear rule requiring that petty misdemeanants be notified of a right to be assisted by counsel.²⁶⁵ Petty misdemeanants also have no right to a jury trial.²⁶⁶ Procedurally, petty misdemeanants are not considered criminal defendants.

Defendants plead guilty to petty misdemeanors with the understanding that they are not pleading guilty to crimes. The petty misdemeanor, however, is arguably transformed into a crime when agencies report the offense to prospective landlords and employers.²⁶⁷ Furthermore, data mining companies frequently misreport petty misdemeanors as though they are criminal offenses.²⁶⁸ Ultimately, individuals are being treated as criminals, even though they are not accorded the same procedural due process protections as would be accorded a criminal defendant.

260. See *supra* Part III.

261. See U.S. CONST. amend. VI; MINN. CONST. art. I, §6.

262. See U.S. CONST. amend. XIV; MINN. CONST. art. I, §7.

263. *Daniels v. Williams*, 474 U.S. 327, 339 (1986) (Stevens, J., concurring in judgment) (emphasis added).

264. See MINN. STAT. § 609.02, subd. 4(a); MINN. R. CRIM. P. 23.06.

265. See *City of Minneapolis v. Wentworth*, 269 N.W.2d 882, 884 n.4 (Minn. 1978) (citing MINN. R. CRIM. P. 23.03).

266. MINN. STAT. §169.89, subd. 2. Cf. MINN. CONST. art. I, § 6 (stating that all criminal defendants have the right to a trial “by an impartial jury.”).

267. See *supra* section II.C and accompanying text. Private agencies misreporting a petty misdemeanor as a crime may be reachable under the Fair Credit Reporting Act.

268. See *id.*

Thus, if records of petty misdemeanors remain available to the public, the individual's constitutional rights will continue to be violated.

3. *Re-Classifying Offenses as Proceedings Resolved in the Petitioner's Favor*

No petitioner has successfully argued before an appellate court a constitutional violation resulting from a criminal record. Another way to bring one's case outside of *Schultz*'s scope is to argue that the criminal proceeding at issue was resolved in the petitioner's favor. The *Schultz* opinion was specifically restricted to inherent authority expungements,²⁶⁹ whereas the expungement statutes specifically list "proceedings . . . resolved in the petitioner's favor" as a ground for expungement.²⁷⁰ As noted above, expungements granted under chapter 609A can include the BCA and other executive branch agencies.²⁷¹ Confusion can easily arise as to what exactly constitutes resolution in a person's favor.²⁷² Proceedings can result in dismissals. For example, an individual may be ordered to pay a fine and as long as the person does not commit any other offenses within the next year, the offense will be "dismissed." On the other hand, the case may have been dismissed upon motion of the prosecutor. Although each case appears to be dismissed, the ramifications for each offense will be very different.

Jurisdictions within Minnesota differ as to what constitutes a proceeding resolved in the petitioner's favor. The authors are aware that some jurisdictions closely follow two Minnesota cases that narrowly define proceedings resolved in a petitioner's favor.²⁷³ These jurisdictions prevent an individual who was granted a stay of adjudication or a dismissal after a finding of guilt from utilizing the in-favor section of the expungement statutes. Other jurisdictions have ruled that a dismissal, after an adjudication of guilt, qualifies

269. *State v. Schultz*, 676 N.W.2d 337, 339 (Minn. Ct. App. 2004).

270. MINN. STAT. § 609A.02, subd. 3.

271. *See supra* Part IV.D.2.

272. *See supra* notes 101–04 and accompanying text.

273. The relevant cases are *State v. Davisson*, 624 N.W.2d 292, 295 (Minn. Ct. App. 2001) (stating that where the petitioner was found to have committed the act for which he was accused, the proceeding was not resolved in his favor) and *State v. Ambaye*, 616 N.W.2d 256, 260–61 (Minn. 2000) (stating that "while a person found not guilty by reason of insanity is not criminally liable, he has been found to have committed the act of which he was accused. A verdict reflecting such a fact is not one 'in favor of' [the petitioner].").

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as a proceeding resolved in the petitioner's favor.²⁷⁴ This is significant for two reasons. First, the *Schultz* case does not apply to proceedings resolved in petitioner's favor because the ground is enumerated in the expungement statutes and the court is not using its inherent authority to issue the expungement order. BCA records, therefore, can be included in an order to seal. Second, the balancing test applied to an in-favor expungement is much easier to satisfy than the test applied in expungement of convictions. The argument that a proceeding was resolved in the individual's favor should be set forth in hopes of reaping these benefits.

VII. CONCLUSION

Expungement is not and should not be a remedy available to all individuals with conviction records. Rather, it should be available to those individuals who have made changes in their lives and who can prove they are not a threat to public safety. Banning these individuals from safe housing and employment opportunities reaps no benefit to society. Without access to housing and employment, individuals face a Hobson's choice: they can be law-abiding, but homeless and penniless, or they can recidivate and have income. Without offering ex-offenders the opportunity to re-enter society, we are encouraging them to recidivate, and to remain a burden on society, not an attribute.

For many years, individuals with a criminal conviction record could rely on the hope that if they rehabilitated themselves, their offense would be expunged. Following *Schultz*, however, individuals with criminal histories have no such hope. Their criminal record will never be erased and will always be available to employers and landlords. Their sentence has not ended, nor will it ever end. As criminal records become increasingly more available and more relevant in employment and housing determinations, those individuals with criminal records will be pushed further and further to the margins of society.

The *Schultz* opinion is especially harmful to the poor and minorities who are more highly impacted by criminal records. The poor are unable to comply with welfare requirements and unable to obtain the type of employment that more affluent individuals

274. The authors understand that a dismissal after a finding of guilt was classified as a proceeding resolved in the petitioner's favor in Hennepin County.

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would willingly reject. Minorities are unable to undo the effects of racial profiling. Further, minorities with criminal records have even less job prospects than white individuals with criminal records. The perpetual existence of a criminal record compounds the barriers that the poor and minorities already experience in attempting to fully participate in society.

Ultimately, if the decision reached in *Schultz* continues to be applied by judges, it will extinguish any hope that ex-offenders have as they try to re-enter society. There is nothing more frightening than an ever increasing culture of hopelessness.